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Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation,
Petitioner,

v.

CHARLES WILLIAM PROFFITT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND APPENDIX

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the precepts of *Gardner v. Florida*, 430 U.S. 349 (1977) require the sentencing authority to allow the cross examination of the authors of any psychiatric reports submitted to the sentencing authority even when those reports are not questioned or disputed by the prisoner or even considered by the sentencing authority.

2. Whether a court of appeals can prevent a district judge, sitting in habeas, from considering a disclaimer by a state trial judge via a written response duly recorded in state court proceedings and/or a disclaimer contained in a desposition, which deposition was introduced in evidence, without objection, by the habeas petitioner himself.

3. Whether a capital defendant's presence is so nonwaivable that his counsel may not waive his presence even at a post trial *ad hoc* hearing.

4. Whether a death sentence is, necessarily, constitutionally infirm simply because the sentencing authority considers non-statutory aggravating factors or because one or more of the statutory factors is infirm if there is at least one valid statutory factor, no mitigating circumstances and where the Supreme Court of Florida independently reviews and reweighs the sentence and determines it to be proper.

5. Whether a Circuit Court of Appeals may ignore the precedents and findings of the Supreme Court of the United States and substitute its judgment for that of this Court regarding aggravating and mitigating circumstances in the same capital case.

6. Whether a United States Circuit Court of Appeals may reverse a District Court's denial of habeas relief in the absence of fundamental error or manifest miscarriage of justice.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, Eleventh Circuit, is reported as 685 F. 2d1227 (11th Cir. 1982) and appears in the Appendix as A-1-217. The amended opinion on rehearing as A-218-222. The Report and Recommendation of the Magistrate appears as A-223-361. The Memorandum Opinion of the District Court, which is not reported, appears as A-362-404. The opinion of the Supreme Court of Florida affirming Respondent's conviction and sentence of death is reported as Proffitt v. State, 315 So. 2d 461 (Fla. 1975). The opinion of this Court upholding Florida's death penalty statute is reported as Proffitt v. Florida, 428 U.S. 242 (1976).

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on September 10, 1982. A Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed and denied on May 31, 1983 (A-218).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The Sixth Amendment provides:

AMENDMENT VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment provides:

AMENDMENT VIII.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, inter alia:

AMENDMENT XIV.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statute 921.141 (1973)

See A-405-412.

Title 28 U.S.C. §2245, 2246 and 2247.

See A-412-414.

Rule 7 of Rules Governing Section 2254 Cases in United States District Courts. See A-414-415.

Rule 103 (a)(1) of Rules of Evidence

for United States Courts and Magistrates. See A-415-416.

STATEMENT OF THE CASE

Respondent burglarized decedent's apartment at 5:00 a. m. While decedent was lying in his bed, Respondent stabbed him in the chest with a butcher knife.

Respondent was charged by Florida with murder in the first degree. A jury returned a guilty verdict and at the bifurcated sentencing proceeding a jail physician (Dr. Crumbley) testified that Respondent had told him he had an uncontrollable desire to kill and that, in his opinion, Respondent was dangerous. The jury recommended the death sentence.

After the jury returned with a recommendation of death, the trial judge, with the consent of the parties, appointed two psychiatrists to examine Respondent. Each psychiatrist submitted written

reports, a copy of which was received by all. Subsequently, an *ad hoc* hearing was held where both psychiatrists were scheduled to appear. One (Dr. Coffer) did appear and was examined by Respondent's counsel. Respondent, however, was not present during the psychiatrist's testimony because his counsel had expressly waived his presence. The other psychiatrist (Dr. Sprehe) did not appear. Respondent's counsel requested an opportunity to examine Dr. Sprehe concerning his report, but the court proceeded to call and sentence Respondent indicating counsel could depose the psychiatrist and make his deposition part of the record.

The Florida Supreme Court affirmed the death sentence. *Proffitt v. Florida*, 315 So. 2d 461 (Fla. 1975). This Court granted certiorari and on July 2, 1976,

rendered its decision affirming. After *Gardner v. Florida*, 430 U.S. 349 (1977) the Florida Supreme Court entered an order asking the trial judge whether he had imposed sentence on the basis of any information not known to the defendant. The trial judge filed a written response saying, inter alia:

> "The Court did not consider presentence investigation . . . [or] . . . psychiatric reports."
>
> (Emphasis supplied)

Subsequently, after exhausting his state remedies, Respondent filed a Petition for Writ of Habeas Corpus in the district court, raising, among others, the following issues:

(a) That the trial judge's imposition of sentence without allowing Respondent to examine the psychiatrist, Sprehe, violated Respondent's right to confrontation; to due process; and to be free

from cruel and unusual punishment.

(b) That the introduction of psychiatrist Coffer's testimony at the *ad hoc* hearing, in Respondent's absence, violated his constitutional right to be present during the proceedings against him.

(c) That the trial court improperly relied on improper aggravating circumstances, thus invalidating the death sentence.

Prior to the evidentiary hearing, the trial judge's deposition was taken at the express behest of Proffitt's counsel. At the hearing, the deposition was introduced in evidence by Proffitt's counsel. In his deposition the judge stated essentially that he had agreed with the jury's recommendation of death, but appointed the two psychiatrists to eliminate the possibility of any miti-

gating circumstances. When they could not furnish any mitigating circumstances, he imposed the sentence of death without considering either their testimony or reports.

The district court, through its acceptance of the magistrate's recommendation, rejected each of the above issues. While Petitioner had raised a *Wainwright v. Sykes*, 433 U.S. 72 (1977) procedural default as a bar, the district court deferred ruling, stating that it would first determine whether there was any merit to any of the issues before determining whether Respondent's procedural defaults could be excused. (A-229-232, footnote 4). Inasmuch as the district court rejected all issues on their merits, the district court did not determine the *Sykes* procedural default issues.

As to issue (a) above, the district court held that Respondent's constitutional rights were not violated when he was denied the opportunity to cross-examine the absent psychiatrist (Dr. Spehe) concerning his report". . . because the trial court did not consider Dr. Sprehe's report in imposing sentence" (A-346). As to issue (b) the district court rejected Petitioner's contention that Proffitt's state trial counsel had the authority to waive his client's presence at the post trial *ad hoc* hearing, (A-336-341), but held this alleged constitutional violation to be harmless beyond a reasonable doubt inasmuch as ". . . petitioner's (meaning Proffitt) sentence was not affected by any adverse testimony that went unrebutted due to this absence."(A-345).

In denying issue (c) the district court said:

> "The Supreme Court indicated in Petitioner's case. Proffitt v. Florida, 428 U.S. 242 (1976) (opinion of Stewart, Powell & Stevens, J.J.) that where at least one statutory circumstance was established and where no mitigating circumstance was found, the death penalty could be imposed, consistent with the Constitution without considering whether each of the stututory aggravating factors found by the trial court was supported by the evidence, Id. at 256 n. 13), or whether the trial court considered nonstatutory aggravating factors, (Id., at 250 n. 8, 256 n. 14)."
>
> (A-233-234)

Consequently, the district court concluded that since this Court had ". . . read the trial court's findings as holding that no statutory mitigating factors existed. . ." (A-235-236) and since there was at least one valid aggravating circumstance" . . . an inquiry into a trial court's findings con-

cerning aggravating circumstances would be inappropriate . . ." (A-237).

On appeal the Eleventh Circuit reversed as to each of the above issues. First, it held that under authority of *Washington v. Watkins*, 655 F. 2d 1346 (5th Cir. 1981) this Petitioner had himself waived any *Sykes* procedural default waivers by not asserting the procedural default in the district court, footnotes 36a, 46 and 60, *Proffitt v. Wainwright*, 685 F. 2d 1227 (11th Cir. 1982). This is not so. (See A-229-233, footnote 4).

As to issue (a) the court of appeals held that the precepts of *Gardner v. Florida*, 430 U.S. 349 (1977) require not only disclosure of reports, but the right to cross-examine the authors and (presumably) any contributors to those reports, *Proffitt v. Wainwright*, 685 F. 2d 1227, 1251-1255. It held that the district court improperly

accepted the trial judge's disclaimer of having considered the reports because such evidence, said the Eleventh Circuit is inadmissible. The Court opined that evidence of a judge's thought processes is inadmissible in a subsequent proceeding to challenge his decision Id., 1255-2256. It held that, assuming arguendo, it were admissible, the trial judge only disclaimed consideration of Dr. Sprehe's report, not its use Id., 1255; and that *Gardner* is violated when a report is used even if it is not considered in imposing sentence.

As to issue (b) the Eleventh Circuit agreed with the district court that Proffitt's presence at the *ad hoc* hearing was not waivable by his counsel, Id., 1257-1258. It rejected, however the district court's findings that Proffitt's absence was harmless beyond a reasonable doubt, stating that since this issue in-

volved a mixed question of law and fact, it could simply disagree with the district court. Id., 1258-1261.

With respect to issue (c) the Eleventh Circuit held that the trial judge had improperly based his sentencing decision in part on nonstatutory aggravating factors and that two of the statutory aggravating factors were improperly found to exist. Id., 1261-1269.

First, the lower court held that the sentencing authority had improperly found the crime to be heinous, atrocious or cruel, rejecting the contention that this Court had, in Proffitt's very case, determined that statutory aggravating circumstance valid as applied. Id., 1263-1265. It also held that the trial judge improperly found the statutory aggravating factor of great risk to many persons, stating it did not meet the Florida

Supreme Court's construction of that provision. Id., 1264. Then the court held that the trial judge had improperly based his sentencing decision partly on non-statutory factors; viz. that Respondent has the propensity to commit the crime for which he was convicted and is a danger to society. Id., 1266-1267. The court reasoned that anytime the sentencing authority considers factors outside those delineated in the statute it increases the risk that tne death penalty would be imposed in an arbitrary and capricious manner. Id., 1267-1268.

Finally, it rejected the district court's conclusion that since this Court had determined, in Proffit's very case, that no mitigating circumstances were found to exist and since, admittedly, there was at least one valid statutory

aggravating circumstance, the sentence was not constitutionally infirm. Id., 1268.

In its Petition for Rehearing and Suggestion for Rehearing En Banc, Petitioner, *inter alia*, pointed out to the lower court that it was ignoring Title 28 U.S.C. §2245 and Rule 103 of the Rules of Evidence for United States Courts and Magistrates. 1/ After holding the cause some eight months on rehearing, the lower court on May 31, 1983 denied rehearing with a two page opinion. (A-218-222).

1/ In view of the multitude of issues, and collateral issues, Petitioner had requested the Eleventh Circuit for permission to enlarge its petition from 15-25 pages, but the request was denied.

A. REASONS FOR GRANTING WRIT

1. THESE ISSUES INVOLVE IMPORTANT FEDERAL QUESTIONS CONCERNING CAPITAL CASES.

While this Court has held that the death sentence does not *per se* violate the Eighth Amendment, the procedural due process requirements that must be observed before a sentence of death can be imposed have been subjected to close scrutiny by this Court and the circuit courts of appeal; so much so, that in the six (6) years since this Court upheld the constitutionality of death statutes, only in one instance has a death sentence been carried out against the defendant's will — almost as if he, rather than the legislatures and the courts, can decide his fate. It would seem that the federal courts are telling us that while we can have the death penalty we cannot

enforce it.

This case presents a multitude of issues which, when intelligently answered by this Court, would serve to clarify, not only the proper scope of habeas review, but whether the death penalty is in fact only a paper sanction.

(a) Importance of Question One

Question number one involves an extension of *Gardner v. Florida*, 430 U.S. 349 (1977) which even the Eleventh Circuit admits has not been addressed by this Court. The Eleventh Circuit holds that no report may be used in the sentencing process in a capital case without giving the defendant the opportunity to cross-examine the author of that report (and presumably all persons contributing to that report). It is one thing to say that a capital defendant

must be furnished with the contents of any report which is to be considered in imposing sentence in order to give the defendant the opportunity to rebut the information contained therein. But, to extend the precepts of *Gardner* to the point of routinely affording the defendant the opportunity to cross-examine the author of a report, be it psychiatric or presentence, simply because it is used in the sentencing process even though it may not be considered in imposing sentence is an extreme extension of *Gardner*; more so, where, as here, the Respondent prior to sentencing receives a copy of the report and does not question, refute or rebut its contents.

It is important for this Court to resolve this issue because the lower court's decision will greatly affect

the use of presentence reports in capital cases. This Court has recognized that presentence investigation reports may provide valuable information favorable to the defendant which the sentencing court might not otherwise obtain. *Williams v. New York*, 337 U.S. 241 (1949). Judges would be most reluctant to order presentence investigation reports knowing that the authors and probably contributors to those reports would be subjected to cross-examination even where what they say is not questioned, refuted or rebutted.

(b) Importance of Question Two

(1) The lower court's decision departs from the accepted and usual course of judicial procedure.

We recognize that the Eleventh Circuit held that the district court ". . . should not have considered the trial

judge's post-decision statements . . ." wherein he disclaimed consideration of the psychiatric reports or testimony in imposing sentence, *Proffitt v. Wainwright*, 685 F. 2d at 1255. But this ruling, which is the subject of question number two, is itself of great importance not only in capital cases but in the administration of habeas corpus proceedings in federal courts; and, in fact, runs counter to Title 28 U.S.C. §2245 and 2247. Moreover, it violates Rule 103 of the Rules of Evidence for United States Courts and Magistrates.

The lower court held that:

> "[s]uch post-decision statements by a judge . . . about his mental processes in reaching decisions may not be used as evidence in a subsequent challenge to that decision."
>
> *Proffitt v. Wainwright at 1255*

But, §2245 allows exactly what the lower court says cannot be done. Section 2245 provides:

> "On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place."

Federal habeas proceedings are replete with challenges to court decisions wherein the thought process behind those decisions are relevant, many of which concern factors considered in sentencing. Section 2245 has been specifically utilized to allow certificates from state trial judges disclaiming consideration of improper factors in sentencing. *Strader v. Troy*, 571 F.

2d 1263 (4th Cir. 1978). In the instant case two disclaimers were considered: one via a "Gardner response" and the other by way of the judge's sworn deposition. It would seem that if a letter from a federal district judge suffices as a disclaimer under §2245, *Fox v. Maroney*, 385 F. 2d 839 (3rd Cir. 1967), a sworn deposition by a state judge would similarly qualify. In fact, a state judge's deposition is held to be a sufficient substitute for a certificate under §2245. *Hampton v. Wyrick*, 588 F. 2d 632 (8th Cir. 1978), footnote 2.

Not only did the lower court ignore §2245, but it ignored Rule 103 of the Rules of Evidence for United States Courts and Magistrates which provides that error may not be predicated on the admission of evidence absent an objection inasmuch as Proffitt was the

one who introduced the trial judge's deposition which contained one of the disclaimers. Thus, it is apparent that the lower court has so departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory powers.

Furthermore, since *Gardner v. Florida*, the Florida Supreme Court has, as a matter of course, in capital cases, entered orders directing the sentencing judges to respond as to whether they considered any material not disclosed to the defense in imposing sentence. These "Gardner responses" have been recognized as a valid and responsible procedural device to assure that the dictates of this Court in *Gardner* have been met. See *Alford v. State*, 355 So. 2d 108 (Fla. 1977) cert. denied 436 U.S. 935.

The Eleventh Circuit has now invali-

dated them.

We submit that unless this Court grants Certiorari on this issue, this Court's precepts in *Gardner* cannot be met because, unless we can ask a judge, it will be impossible to determine what he did or did not consider.

(2) The decision of the lower court on question number two is in conflict with decisions of other circuit courts of appeal.

In holding that disclaimers by trial judges denying they considered impermissible factors in sentencing may not be considered, the decision of the Eleventh Circuit is not only in conflict with the Third Circuit, *Fox v. Maroney*, and the Fourth Circuit, *Strader v. Troy*, supra, but also with the Eighth Circuit, *McAnulty v. United States*, 469 F. 2d 254 (8th Cir.

1972), *Hampton v. Wyrick*, supra, and the Ninth Circuit, *United States v. Eidum*, 474 F. 2d 581 (9th Cir. 1973), all of which hold that disclaimers by trial judges, denying they have considered impermissible factors in sentencing, not only may be considered but must be accepted.

Moreover, the lower court misapplies the two cases upon which it relies; *Fayerweather v. Ritch*, 195 U.S. 276 (1904) and *United States v. Couch*, 566 F. 2d 1311 (5th Cir. 1978) and is in fact in conflict with *Couch*. In *Couch*, a trial judge had declared a mistrial. A dispute arose as to the reasons for the mistrial. In a memorandum opinion issued weeks after the mistrial was declared, the trial judge disclaimed it was for personal reasons. The Fifth Circuit accepted

at face value this disclaimer, saying

> "a judge's statement of mental processes is absolutely unreviewable."
>
> Id., at 1316

What *Fayerweather* holds is that a judge's statement about his thought processes in reaching a decision may not be used in a subsequent proceeding to impeach that decision. *Fayerweather* does not say it may not be used to support that decision.

(c) Importance of Question Number Three.

The Constitution guarantees to every criminal defendant the assistance of counsel. This Court has vigilantly protected that right. If counsel's assistance is so sacrosanct, one has to assume that it must be because the Constitution and this Court considers his expertise so vital that counsel's authority to act

in the defendant's stead cannot, except in the most limited situations, be questioned.

This issue involves the limitations and extent of that authority. After the jury returned its verdict of guilt and recommendation of death, the trial judge appointed two psychiatrists to examine Respondent before he imposed sentence. Prior to the *ad hoc* hearing, where one of the psychiatrists testified, Respondent's counsel specifically waived Respondent's presence during the psychiatrist's testimony. Nevertheless, the Eleventh Circuit held that ". . . presence at a capital trial is nonwaivable," *Proffitt v. Wainwright*, at 1257; and, while recognizing that this *ad hoc* proceeding was not part of the trial, held it to be a "critical stage"; therefore, Respondent's presence was nonwaivable by his counsel.

On more than one occasion, the Justices of this Court have commented that once a defendant has the assistance of counsel, the vast array of decisions, both strategic and tactical, rests with the attorney. *Wainwright v. Sykes*, 433 U.S. 72, 53 (1977), *Estelle v. Williams*, 425 U.S. 501 (1976).

This case serves as a further refinement of that authority. It is important that the bench and bar understand the extent and limitations of that authority. It is important to the bar as attorneys must know whether they are mere pawns in a higher game played by the federal courts; it is important to the bench so that judges can determine once and for all whether they, not lawyers, should conduct the defense of the accused.

(1) The Decision of the Lower Court Conflicts With Prior Decisions of This Court.

The Eleventh Circuit based its conclusion that presence at a capital case is nonwaivable on *Diaz v. United States*, 223 U.S. 442 (1912) and *Hopt v. Utah*, 110 U.S. 574 (1884), but neither of those cases are predicated on constitutional grounds. *Diaz* involved the construction of a Phillipine statute dealing with the defendant's right to be present and *Hopt* dealt with a Statute of the territory of Utah also requiring the defendant's presence. Moreover, what this Court said in *Hopt* ". . . on the subject of the presence of the defendant was dictum, and no more." *Snyder v. Massachusetts*, 291 U.S. 97, 117 (1934) footnote 2.

While the Constitution does not

specifically require the presence of an accused at his trial, we do not challenge his right to be present. But because he may have a right to be present does not mean he cannot waive that right. This Court has recognized that this right may be waived either through the defendant's actions, *Illinois v. Allen*, 397 U.S. 337 (1970) or by his attorney, *Frank v. Mangum*, 237 U.S. 309 (1915), *Howard v. Kentucky*, 200 U.S. 164 (1906) and the decision of the lower court is in direct conflict with those cases.

(d) The Importance of Question Number Four.

Since the Court decided *Proffitt v. Florida*, 428 U.S. 242 (1976) a vigorous debate has arisen as to whether a sentence of death is, necessarily, constitutionally infirm where it is based

in part on nonstatutory factors or because one or more of the statutory factors lacked evidentiary sufficiency. We submit that the Court answered the question in the negative in *Proffitt v. Florida*. This is manifest because this Court was clearly aware that at least one of the aggravating factors found to exist was nonstatutory and that at least one of the statutory aggravating factors lacked evidentiary sufficiency. Yet in footnote 13 of *Proffitt v. Florida*, this Court indicated it was not fatal where there were no mitigating factors to outweigh the remaining valid aggravating factors.

Nevertheless, and although, as we believe, this Court has answered the question, the issue is a recurring one.

Stephens v. Zant, 631 F. 2d 397 (5th Cir. 1980), cert. granted, 70 L. Ed 2d 82 (1981), question certified, *Zant v. Stephens*, 72 L. Ed 2d 222 (1982), *Henry v. Wainwright*, 661 F. 2d 56 (5th Cir. 1981), cert. granted, judgment vacated, 73 L. Ed. 2d 1326, but see *Henry v. Wainwright*, 686 F. 2d 311 (5th Cir. 1982). *Barclay v. Florida*, 74 L. Ed. 2d 382 (1982), *Williams v. Maggio*, 679 F. 2d 381 (5th Cir. 1982), *Martin v. Louisiana*, 449 U.S. 998 (1980), *Drake v. Zant*, 449 U.S. 999 (1980), *Westbrook v. Balcom*, 449 U.S. 999 (1980). Thus it is an issue which has plagued at least Florida, Georgia and Louisiana.

Moreover, the lower court's resolution of this issue is in direct conflict with the decision of the Fifth Circuit in *Williams v. Maggio*, supra.

Because it is recognized that the issue in the instant case is similar to the issue raised in *Zant v. Stephens*, and *Barclay v. Florida*, wherein this Court granted Certiorari and since the issue remains unresolved we urge the Court to grant Certiorari.

(1) The decision of the Eleventh Circuit on question numbered four conflicts with the decisions of this Court in Proffitt v. Florida and Alabama v. Evans, Case No. 8-858 decided April 22, 1983.

The Eleventh Circuit recognized that there was at least one valid aggravating factor in Proffitt's case; viz: that the murder was committed during the course of a burglary. Nevertheless, the court stated:

> "We cannot conclude, however, that appellant's entry of the victim's house, which he did for the purpose of committing the murder, was a circumstance "sufficient[ly] aggravating" in nature that the judge necessarily would have imposed the death penalty on that ground alone.
>
> *Proffitt v. Wainwright, 685 F. 2d at 1268*

But, the Eleventh Circuit refused to consider that the Florida Supreme Court independently, reviewed and reweighed the sentence of death and found it to be proper.

In *Proffitt v. Florida*, this Court said:

> "The Florida capital sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating

> circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted."
>
> 428 U.S. 252-253 (emphasis supplied)

Consequently, regardless what the Eleventh Circuit could or could not determine with respect to whether any one aggravating circumstance would have been sufficiently aggravating for the sentencing trial judge court this Court has suggested that a sentence of death is not constitutionally infirm where the highest state appellate court reviews that sentence, reweighs it and independently finds it to be proper. See for example *Alabama v. Evans*. This is because, we believe, appellate sentencing is not constitutionally prohibited.

Perhaps this Court did not mean to thusly suggest. If so then this is the forum by which it now can and should clarify its position as to the impact on the capital sentencing process of a review and independent reweighing of the sentence of death by the highest court of a state. It should by now be abundantly clear to this Court that lower federal courts are imposing such stilted sentencing procedures that channelled or structured discretion is impossible. They are imposing mechanical procedures better left to computers and which, we submit, this Court never intended — all in the hopes of destroying capital punishment through attrition.

Resolution of this question is a must for a determination of the proper

application of capital procedures and the role federal courts should play in the process.

(e) The Importance of Question Five.

Simply stated this question involves the issue of whether this court's opinions mean anything.

The victim in this case was stabbed in the chest, with his wife at his side, while lying in bed at night. The state trial judge found as, aggravating circumstances among others, that the crime was especially heinous, atrocious or cruel and that the defendant knowingly created a great risk of death to many persons.

Although the Florida Supreme Court affirmed the sentence of death and although in Proffitt's very case this Court approved the construction given

these factors as not being impermissibly vague or broad, *Proffitt v. Florida*, 428 U.S. 255-256, the Eleventh Circuit, ignoring precedent and the law of the case concept held these factors to be unconstitutionally vague as applied. First, the Court held that this crime did not meet the construction placed on the heinous, atrocious or cruel factor as one being conscienceless or pitiless in the sense that it is unnecessarily tortorous to the victim. Second, that the great risk of death to many persons factor was based more on caprice than on reason.

The Eleventh Circuit attempted to circumvent this Court's holding by stating that this Court in *Proffitt v. Florida*, never determined the constitutionality of these factors as applied.

Perhaps the Justices of this Court were speaking to themselves rather than the nation when they wrote footnote 12 of *Proffitt*. Therein this Court said:

> 12. The Supreme Court of Florida has affirmed death sentences in several cases including the instant case where this eighth statutory aggravating factor was found without specifically stating that the homicide was "pitiless" or "torturous to the victim"
>
> * * * * * * * * *
>
> (Citing Numerous Cases)
>
> * * * * * * * * *
>
> But the circumstances of all these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in Dixon and applied in Alford, Tedder, and Halliwell.
>
> (emphasis supplied)

Thus in Proffitt's very case this Court held that the murder fell within the heinous, atrocious or cruel aggravating factor.

Not satisfied with substituting its judgment for that of this Court with respect to statutory aggravating circumstances the Eleventh Circuit went further and stated that the sentencing state trial judge did in fact find mitigating circumstances to exist and that the ". . . state's characterization . . ." that there were none found, was incorrect. *Proffitt v. Wainwright*, 685 F. 2d at 1268.

The problem is that this "charactization" was not made by the "state". It was made by the Supreme Court of the United States.

Thrice this Court in Proffitt's very case stated the trial judge did not find mitigating circumstances.

First it said that:

> "The judge also found specifically that none of the statutory mitigating circumstances existed."
>
> (428 U.S. at 247)

Then in footnote 13 this Court twice made the same point. It said first

> ". . . if some mitigating circumstances had been found to exist . . ."

clearly referring to the fact that none were. Further on in the same footnote, the Court said

> " . . . each mitigating circumstance was expressly found not to exist."

Manifestly it was essential to the Eleventh Circuit's decision to make a determination that the trial judge's findings with respect to the above two aggravating circumstances were improper

and that there were in fact some mitigating circumstances found to exist in order to dispel any harmless error argument.

The decision of the Eleventh Circuit is not only in conflict with the decision of this Court in *Proffitt v. Florida*, and with its recent decision in *Alabama v. Evans*, Case No. 8-858, decided April 22, 1983, wherein this Court held that the construction of the aggravating factor of great risk of death to many persons was properly for the Alabama Courts, but also conflicts with the basic tenet that whatever was before this court and disposed of is finally settled. *N.A.A.C.P. v. Alabama*, 360 U.S. 240 (1959), *Deen v. Hickman*, 358 U.S. 57 (1958) *Ex Parte Sibbold v. United States*, 37 U.S. 488 (1838).

The question is important because by ignoring this court's opinion in Proffitt's very case the Eleventh Circuit departed from the accepted course of judicial proceedings. If the opinions of this Court are to be accorded the respect to which we believe they are entitled and which we believe this Court demands from the state judiciary it should also require the same respect from the federal judiciary. This question falls squarely within what this Court said in *Hutto v. Davis*, 454 U.S. 370, 374-375 (1982):

> More importantly, however, the court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases "by virtue of their commissions, not their competence." And arguments may be made one way or the

> other whether the present case is distinguishable, except as to its facts, from Rummell. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.

(e) The Importance of Question Six. 2/

2/ This question was raised below by way of the Petition for Rehearing and Suggestion for Rehearing En Banc.

For years now, federal courts have been lamenting the increased work load arising through federal habeas petitions. Yet, while paying lip service to such statements as "a petition for writ of habeas corpus may not do service for an appeal," "error that will justify reversal on direct appeal will not necessarily support collateral review," or "plain error does not necessarily suffice to justify habeas relief," federal courts have, in practice, been sitting as super appellate courts, setting asise state judgments simply because they do not agree.

It has become fashionable to blame Congress. But the truth of the matter is that Title 28 U.S.C. §2254 is not of recent vintage. Court interpretations of §2254, expanding the powers of federal courts with respect to the "Great Writ" have been the true culprits. See *Fay v. Noia*, 372 U.S. 391 (1963), *Townsend v. Sain*, 372 U.S. 293 (1963). Every time this Court has taken one step in expanding the Writ, the lower federal courts (by leap-frogging) have jumped ten. Yet, whenever this Court has rendered a limiting interpretation federal circuit courts of appeal have strained to minimize its impact.

The decision of the lower court is

a prime example. Whenever it disagreed with any finding, or ruling, be it of the state court, district court, or even of this Court, it did not hesitate to discard it by either ignoring it, or by simply saying "we do not have to and we do not agree." Thrice this Court said in Proffitt's very case that no mitigating circumstances were found to exist. *Proffitt v. Florida*, 428 U.S. at 242 and footnote 13. The lower court disagreed and simply ignored this Court's decision. *Proffitt v. Wainwright*, 685 F. 2d at 1268. When the district court said that the taking of the psychiatrist's testimony, in Respondent's absence, was harmless beyond a reasonable doubt, the lower court held that this was a mixed question of law and fact, and thus it could disagree,

Id., at 1258 - 1260 and footnote 48, concluding it was not harmless because there was the possibility that Respondent's presence might have made a difference to the psychiatrist's opinion. Id., at 1260. Again, when the district court concluded that, in the absence of mitigating circumstances, an inquiry into the sufficiency of the one admittedly valid aggravating factor to justify the sentence of death was inappropriate, the lower court simply disagreed and substituted its judgment. Id., at 1268.

This case vividly underscores the need for a definitive standard by which federal courts are permitted to review state court judgments. Is a state judgment going to be set aside simply because a federal court disagrees, under the guise of calling it a mixed question of law and fact; or, are federal courts

going to be bound by a stricter standard which restores some semblence of integrity to those judgments?

We submit that the Court's recent decisions in *Engle v. Isaac*, 71 L.Ed. 2d 783 (1982) and *United States v. Frady*, 71 L.Ed 2d 816 (1982) point the way. While those cases are primarily concerned with procedural defaults, we believe the time has come for this Court to announce that once a defendant is incarcerated and sentenced pursuant to a presumably valid judgment, habeas relief should not be granted in the absence of fundamental error or manifest miscarriage of justice and that no longer may a federal court grant habeas relief simply because it disagrees or is not in philosophical accord with the judgment or sentence. Certain Constitu-

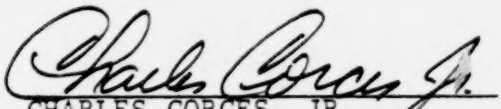
tional errors may be so fundamental that prejudice is presumed, such as those involving conflicts of interest, *Cyler v. Sullivan*, 446 U.S. 335 (1980) or jury discrimination selection procedures, *Peters v. Kiff*, 407 U.S. 493 (1972). But, in the absence of error of such magnitude, wherein because of policy considerations, prejudice must be presumed, we submit that constitutional error should not, of itself, suffice to grant habeas relief in the absence of some showing, by the habeas petitioner, of a manifest miscarriage of justice, or fundamental error. Compare *Henderson v. Kibbie*, 431 U.S. 145 (1977), *Kaufman v. United States*, 394 U.S. 217 (1969), Justice Black dissenting. We urge the Court to grant Certiorari on this issue and limit the flagrant abuse of the Writ.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant Certiorari and reverse the holding of the Eleventh Circuit Court of Appeals.

Respectfully Submitted,

JIM SMITH
ATTORNEY GENERAL



CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

I, CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the 21 day of ~~June~~ July, 1983, I served three copies of the Petition for Writ of Certiorari on Kathryn Emmett, Esq., 8 Pheasant Lane, Stamford, Connecticut, 06903, Mr. David Golub, Esq., Silver, Golub & Sandak, 733 Summer Street, Stamford, Connectic 06905, and Debroah Fins, Esq., Suite 2030, 10 Columbus Circle, New York, New York, 10019, by a duly addressed envelope with postage pre-paid.

CHARLES CORCES, JR.
Assistant Attorney General

Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation,
Petitioner,

v.

CHARLES WILLIAM PROFFITT,
Respondent

APPENDIX
FOR

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

Charles William PROFFITT,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation,
Respondent-Appellee.

No. 80-5997.

United States Court of Appeals
Eleventh Circuit

Sept. 10, 1982

Florida prisoner, who has been sentenced to death on conviction of first-degree murder, sought federal habeas corpus. The United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., denied relief, and petitioner appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) district court judge's rejection, without hearing testimony, of magistrate's recommendation concerning claims of ineffective representation was not error where

credibility choices were not dispositive; (2) defendant was not denied effective assistance of counsel at penalty or guilt phases; (3) right to cross-examine adverse witnesses applies to capital sentencing proceedings at least where necessary to insure reliability of the witness' testimony; (4) violation of defendants right to be present at taking of psychiatrist's testimony at penalty stage was not harmless beyond a reasonable doubt; (5) relying on nonstatutory aggravating factors violated state as well as federal constitutional law; and (6) unconstitutional application of statutory aggravating factors and consideration of nonstatutory ones entitled petitioner to resentencing.

Affirmed in part; reversed in part; and remanded.

1. Criminal Law §986.2(1)

It is constitutionally required in

capital cases that the sentencing authority consider all mitigating evidence proffered by defendant relating to his character and record and to circumstances of the particular offense. U.S.C.A. Const. Amend. 8

2. Habeas Corpus §85.3 (1)

Magistrate's reliance on petitioner's written proffer of mitigating evidence that counsel could have introduced at penalty phase of capital trial did not constitute competent evidence on claim of ineffective assistance of counsel and even if it had constituted competent evidence rejection by the district court of such nontestimonial evidence would not have required a second evidentiary hearing in connection with the district judge's rejection of magistrate's recommended ruling. 28 U.S.C.A. §636(b)(1),(b)(1)(B);U.S.Dist. Ct. Rules M.D.Fla., General Rule 6.02.

3. Habeas Corpus §113 (13)

Where district judge did not disbelieve defense counsel's testimony, which the magistrate had accepted, to effect that counsel engaged in no special preparation for penalty phase but simply disagreed that such separate preparation was required to meet the legal standard of reasonably effective counsel, the judge's rejection of magistrate's recommended ruling that failure to present mitigating evidence rendered representation adequate did not depend on a difference in credibility choices requiring a rehearing before the district judge. 28 U.S.C.A.§636(b)(1),(b)(1)(B); U.S.Dist. Ct. Rules M.D. Fla., General Rule 6.02.

4. Habeas Corpus §59

Although district judge's disagreement with magistrate on whether counsel's failure to request a presentence investiga-

tion constituted ineffective assistance directly concerned counsel's testimony at the evidentiary hearing on habeas petition and in some sense could be viewed as a difference of interpretation, the difference was not a matter of credibility requiring a hearing before district judge rejected magistrate's conclusion of ineffective assistance as matter was not one where magistrate believed counsel was telling the truth and the district court disbelieved his testimony but was only a matter of interpretation. 28 U.S.C.A. § 636 (b)(1),(b)(1)(B); U.S.Dist.Ct. Rules M.D.Fla., General Rule 6.02.

5. Habeas Corpus §90

Unless words spoken by a witness are inherently ambiguous, decision whether a second habeas hearing before the district judge is necessary before the judge disagrees with the magistrate's recommenda-

tions is left to the sound discretion of the district judge. 28 U.S.C.A.§636 (b)(1)(B);U.S.Dist.Ct. Rules M.D. Fla., General Rule 6.02.

6. Habeas Corpus §59

Additional hearing by district judge has not required before rejecting magistrate's recommendation that counsel's failure to object to admission of testimony of psychiatric consultant who had examined petitioner for sheriff's office following arrest was ineffective representation where although judge disagreed with magistrate's statement that consultant's testimony was unnecessary to establish statutory mitigating factors as regards death penalty that disagreement did not rest on rejection of credibility choices made by the magistrate and that part of counsel's testimony given credence by the judge was not mentioned by the magistrate. 28 U.S.C.A. §636 (b)(1),

(b)(1)(B); U.S. Dist. Ct. Rules M.D. Fla., General Rule 6.02.

7. Habeas Corpus §59

No additional hearing was required by district judge before rejecting magistrate's recommendation that petitioner was denied effective assistance of counsel at penalty stage for failure to explain a prior conviction where neither magistrate's nor judge's conclusions on the issue were based on any testimony at evidentiary hearing and opinions of each and disagreement between them were based solely on petitioner's written proffer and on review of trial transcript of penalty phase. 28 U.S.C.A.§636(b)(1),(b)(1)(B);U.S.Dist. Ct. Rules M.D.Fla., General Rule 6.02.

8. Witnesses §192

Florida law employs an objective standard of confidentiality as regards confidential communications between spouses.

9. Criminal Law §641.13(6)

Counsel's failure to present evidence in support of motion to suppress testimony by individual who resided with defendant and his wife did not constitute ineffective assistance where likelihood that defendant would have prevailed on claim of spousal privilege was not great and situation was such that the spouses knew or should have known that the communication was being overheard. U.S.C.A.Const. Amend. 6.

10. Criminal Law §1158 (1)

District court's conclusion on whether defendant enjoyed effective assistance of counsel is entitled to no special deference as it is a mixed question of fact and law and appellate court must review the record of counsel's actual performance in determining independently whether the constitutional standard was met. U.S.C.A. Const. Amend. 6.

11. Criminal Law §641.13 (1)

Constitutional right to effective assistance of counsel is satisfied by reasonably effective assistance and a defendant is not entitled to errorless counsel and counsel's performance may not be judged by benefit of hindsight.
U.S.C.A. Const. Amend. 6

12. Criminal Law §641.13 (1)

Constitutional standard for effective assistance of counsel is no more stringent in capital cases than in cases where less severe punishments are imposed; nevertheless, seriousness of the charges is a factor that must be considered in assessing counsel's performance, U.S.C.A. Const.Amend.6.

13. Criminal Law §641.13(6)

Petitioner was not denied effective assistance of counsel by failure to call character witnesses at 1974 capital sentencing hearing at counsel's belief that

under Florida law he could not introduce evidence of nonstatutory mitigating factors was entirely reasonable and the 1978 Lockett decision, i.e., that sentencer must be free to consider all relevant mitigating circumstances, was not clearly foreshadowed. U.S.C.A.Const. Amend. 6.

14. Criminal Law §641.13(7)

Failure to request presentencing investigative report did not work a denial of effective assistance of counsel at penalty stage of capital punishment case where, under then existing law, counsel reasonably understood the rule as limiting mitigating evidence to statutory factors and there was no showing that investigation at time of trial would have revealed evidence substantiating any statutory mitigating factor or repeating any of the aggravating factors asserted by the prosecution and, at time of 1974 trial, Florida

law did not provide for presentence investigations in capital cases. West's F.S.A. §§ 921.141, 921.231; U.S.C.A. Const.Amend. 6.

15. Criminal Law §641.13(2, 6)

Under law as it existed in 1974, it could not be said that counsel's decision to raise psychiatric mitigating factors in capital penalty case without first obtaining expert assistance or undertaking further investigation rendered his assistance constitutionally defective, notwithstanding that he relied solely on a prosecution witness who, while acting as psychiatric consultant for sheriff had examined defendant shortly following arrest to establish a mitigation defense and representation was not ineffective merely because counsel, who learned of the conversations the night before trial, did not seek a continuance. West's F.S.A. §

921.141; U.S.C.A.Const.Amend. 6.

16. Criminal Law §641.13(2)

Brevity of sentencing argument and failure to object to various arguments and evidence presented by the prosecution at capital penalty phase was not shown to have constituted ineffective assistance of counsel. West's F.S.A. § 921.141; U.S.C.A. Const.Amend. 6

17. Criminal Law §662(1)

Right to cross-examine adverse witnesses is guaranteed to criminal defendants by the confrontation clause of the Sixth Amendment. U.S.C.A.Const.Amend. 6.

18. Witnesses §266

Rights guaranteed by the Sixth Amendment, including right to cross-examination, are only applicable to proceedings that constitute critical stages of trial. U.S.C.A.Const.Amend. 6.

19. Criminal Law §1208(1)

Because the death penalty, unlike other punishments, is permanent and irrevocable, the procedures by which the decision to impose a capital sentence is made bring into play constitutional limitations not present in other sentencing decisions. West's F.S.A. § 921.141.

20. Criminal Law §986.2(3)

Florida capital penalty defendant had a constitutional right to cross-examine court-appointed psychiatrist before psychiatrist's report could be used by the trial judge in determining sentence. West's F.S.A. § 921.141; U.S.C.A.Const. Amend. 6.

21. Witnesses §266

Right to cross-examine adverse witnesses applies to capital sentencing proceedings, at least where necessary to insure reliability of the witnesses' testimony. West's F.S.A. § 921.141;

U.S.C.A.Const.Amend. 6.

22. Habeas Corpus §113(12)

District court's fact findings in a habeas proceeding are binding on the reviewing court unless clearly erroneous.

23. Habeas Corpus §92(1)

District court on habeas petition should not have considered state trial judge's post-decision statements concerning the influence that various facts had on his decision to impose capital penalty as the the trial judge's testimony was not limited to matters of basic, historical fact but directly addressed the effect of the challenged psychiatric evidence on his sentencing decision.

24. Criminal Law §956(1), 957(1)

Postdecision statements by a judge or juror about his mental process in reaching decision may not be used as evidence in a subsequent challenge to the decision.

25. Habeas Corpus §113(12)

Finding at capital penalty phase that state trial court did not consider, report of psychiatrist whom petitioner was not permitted to cross-examine was clearly erroneous in view of trial judge's testimony that he received and read the report and considered it for limited purpose of ascertaining whether it supported the psychiatric mitigating circumstance and that after determining that the report did not support such mitigating factors he did not consider it further. U.S.C.A.Const. Amend. 6.

26. Constitutional Law §268(6)

Criminal Law §636(1)

Defendant's right to be present at all stages of a criminal trial derives from the confrontation clause of the Sixth Amendment and due process clause of the Fourteenth Amendment. U.S.C.A.Const.Amends. 6,

14.

27. Criminal Law §636(3)

Defendant's right to be present at all stages of trial extends to all hearings that are an essential part of the trial, i.e., to all proceedings at which defendant's presence has a relation, reasonably substantial, to the fullness of his opportunity to defendant against the charge. U.S.C.A.Const.Amends. 6, 14.

28. Criminal Law §636(1)

A defendant's constitutional right to be present at trial extends to the sentencing as well as the guilt portions of the capital trial. West's F.S.A. § 921.141; U.S.C.A.Const.Amends. 6, 14.

29. Criminal Law §636(4)

Ad hoc proceeding scheduled by Florida trial judge after completion of formal sentencing hearing to allow cross-examination concerning court-ordered psychiatric re-

ports was a "critical stage" of trial at which the capital penalty defendant had a constitutional right to be present, in that under Florida law the judge is the ultimate decision maker as regards capital punishment. West's F.S.A. §921.141; U.S.C.A.Const.Amends. 6, 14

See publication Words and Phrases for other judicial constructions and definitions.

30. Criminal Law §636(2)

A defendant's presence at a capital trial is nonwaivable. U.S.C.A.Const. Amends. 6, 14.

31. Criminal Law §636(2)

Even if a defendant may waive his right to be present at a capital trial, defendant did not knowingly or voluntarily waive his right to presence at hearing to allow cross-examination concerning court-ordered psychiatric reports where it was not dis-

puted that defendant was neither apprised of hearing at which one psychiatrist testified or afforded an opportunity to assert his right to attend. U.S.C.A.Const.Amends. 6, 14.

32. Habeas Corpus §30(1)

Where the state did not argue that failure to raise on direct appeal issue of counsel's waiver of capital defendant's presence during portion of sentencing phase the federal court would not consider such waiver as a basis for denying the claim on habeas corpus.

33. Habeas Corpus §113(12)

In reviewing questions of law and mixed questions of facts and law, the Court of Appeals is free to substitute its own judgment for that of the district court in a habeas corpus proceeding.

34. Habeas Corpus §113(12)

Determination whether constitutional

error is harmless presents a mixed question of fact and law and is a matter on which reviewing court, in a habeas proceeding is free to substitute its own judgment, although it will defer to the district court's subsidiary findings absent clear error.

35. Criminal Law §1166.14

Error in denying defendant his right to hear testimony of psychiatrist who conducted court-ordered examination at penalty phase of capital case was harmless where only aggravating circumstance to which the report and testimony were relevant was amply substantiated by defendant's own statements to another medical witness, who related them at sentencing, and defendant did not indicate that his presence would have enabled him to rebut the psychiatrist's testimony on the issue. U.S.C.A.Const.Amends. 6, 14.

36. Habeas Corpus §45.2(4)

Whether or not petitioner's absence at hearing concerning court-ordered psychiatric reports likely prejudiced him was not the applicable standard in determining a constitutional error but rather, if there was any reasonable possibility that the capital defendant's absence and inability to respond to the testimony affected the capital sentencing decision, the habeas court would not engage in speculation as to the probability that petitioner's presence would have made a difference. U.S.C.A. Const.Amends. 6, 14.

37. Criminal Law §1166.14

Florida defendant's absence from hearing at which the trial judge considered court-ordered psychiatric report was not harmless error where neither counsel nor the examining doctors were aware of fact that petitioner was then receiving anti-

psychotic medication and evaluation of mental state at time of offense was based in part on observation that, at time of examination, petitioner exhibited no psychotic tendencies and petitioner presented additional evidence, such as repeated suicide attempts, of which his attorneys and the doctors had not been informed at time of capital sentencing hearing. U.S.C.A.Const.Amends. 6, 14.

38. Habeas Corpus §30(3)

Florida petitioner's claim that two of the aggravating factors relied on in imposing capital punishment were unsupported by any evidence was cognizable on habeas corpus. West's F.S.A. § 921.141.

39. Habeas Corpus §30(3)

Although two aggravating factors challenged by Florida petitioner were upheld by the Supreme Court as facially valid on direct appeal in the capital penalty case,

where the Court did not rule on the constitutionality of those provisions as applied, the issue was properly before the federal court in subequent habeas proceeding. West's F.S.A. §921.141; U.S.C.A. Const.Amend.8.

40 Homicide §354

The heinous, atrocious and cruel aggravating factor of Florida death penalty statute requires acts of physical harm or torture to the murder victim prior to or accompanying the act resulting in death. West's F.S.A. § 921.141(5)(c).

41. Homicide §354

The heinous, atrocious and cruel aggravating factor of Florida's capital penalty scheme was not applicable absent evidence that defendant perpetrated any physical act on victim other than single stab in the chest that resulted in death. West's F.S.A. § 921.141(5)(c).

42. Homicide §354

Aggravating factor of Florida's death penalty scheme for knowingly creating a great risk of death to many persons was not applicable as the killing, which consisted of infliction of single knife wound in chest of victim, endangered only the victim and, although facts indicated that defendant struck victim's wife with his fists when she was awakened by her husband's moans, there was no evidence that the blows were of such force that they were likely to kill the wife and, in any event, sum of acts surrounding killing at most could be said to have risked death to two persons. West's F.S.A. §921.141(5)(c).

43. Habeas Corpus §30 (3)

Although on direct appeal to Florida Supreme Court the petitioner objected to findings concerning at least two of the aggravating circumstances and asserted

generally that the judge had exercised unfettered discretion in imposing death sentence, considering that the state did not argue tha petitioner had waived his objections to the aggravating circumstances the state had waived any argument that petitioner had waived his right to complain of consideration of nonstatutory aggravating factors. West's F.S.A. § 921.141; U.S.C.A.Const.Amends. 8, 14.

44. Criminal Law §1208(1)

In transcending list of aggravating factors set forth in Florida capital penalty statute and in basing death sentence in part on finding that petitioner had propensity to commit the crime for which he was convicted and was a danger and menace to society the trial judge not only committed error under state law but exceeded federal constitutional limitations on capital sentencing, thereby rendering

the sentence unconstitutional. West's F.S.A. § 921.141(5); U.S.C.A.Const.Amends. 8,14.

45. Criminal Law §1177

Constitutional error in considering non-statutory aggravating factors in imposing death penalty was not harmless on ground that the trial judge found no mitigating circumstances where application of two of the three statutory aggravating factors was unconstitutional and it could not be said that death penalty would have been imposed in light of remaining statutory factor, i.e., murder in conjunction with burglary, and findings did not unqualifiedly state that there were not mitigating circumstances as trial court indicated that mitigating factors were "primarily" negated by the aggravating factors. West's F.S.A. § 921. 141; U.S.C.A.Const.Amends. 8, 14.

46. Criminal Law §1147

The rational appellate review of capital sentencing decisions contemplated by the Furman decision and its progeny requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had it correctly applied the law and post hoc justifications of the sentencing decision, which depends on a rationale for imposing death distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities and only where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result should a sentence be affirmed despite constitutional error. West's F.S.A. §921.141; U.S.C.A. Const. Amends. 8,14.

47. Criminal Law §996 (1.1)

Florida trial court's unconstitu-tional application of statutory aggravating factors and consideration of nonstatutory ones in imposing death sentence entitled petitioner to resentencing. West's F.S.A. § 921.141; U.S.C.A.Const.Amends. 8, 14.

Appeal from the United States District Court for the Middle District o Florida.

Before VANCE, KRAVITCH and CLARK, Circuit Judges.

KRAVITCH, Circuit Judge:

I. Case History[1]

On March 21, 1974 appellant Charles Proffitt was tried and convicted of first degree murder by a jury in the Circuit Court of Hillsborough County, Florida. In the second phase of the bifurcated proceeding the jury issued an advisory sentence recommending the death penalty, and the judge, in agreement with that recommendation, sentenced appellant to death. Pursuant to Florida's capital sentencing statute, Pub.L.No. 72-724, § 9, 1972 Fla. Laws (current version at Fla.Stat. Ann.

1. The facts of this case have been summarized twice already in the published opinions of the Florida Supreme Court, Proffitt v. State, 315 So.2d 461, 463-64 (Fla.1975), and the United States Supreme Court, Proffitt v. Florida, 428 U.S. 242, 244-47, 96 S.Ct. 2960, 2963-64, 49 L.Ed.2d 913 (1976). We therefore deem it sufficient for purposes of this opinion to set forth only a brief description of the procedural history of this case and such additional facts as are relevant to the specific issues raised in this appeal.

§921.141 (West Supp.1982)), appellant was afforded an automatic appeal to the Florida Supreme Court, which upheld his conviction and sentence. Proffitt v. State, 315 So.2d 461 (Fla. 1975). Appellant then sought review by the United States Supreme Court, which granted certiorari to consider the constitutionality of the Florida death-penalty statute. 423 U.S. 1082, 96 S.Ct. 1090, 47 L. Ed 2d 94 (1976). Seven members of the Court, in three separate opinions, held that the statute did not violate the eighth or fourteenth amendments, Proffitt v. Florida, 428 U.S.242, 244-60, 96S.Ct. 2960, 2963-70, 49 L.Ed.2d 913 (1976). (opinion of Powell,Stevens & Stewart, JJ); id at 260-61, 96 S.Ct. at 2970 (opinion of White and Rehnquist, JJ. and Burger, C.J.); id. at 261, 96 S.Ct. at 2970 (opinion of Blackmun, Jr.), and hence

affirmed appellant's sentence. [2]

Having exhausted his direct remedies, appellant sought collateral relief -- first in the state courts, which denied relief summarily without an evidentiary hearing, see Proffitt v. State, 360 So. 2d 771 (Fla. 1978), cert dismissed on appellant's motion; Proffitt v. State, 372 So. 2d 1111

2.
The United States Supreme Court addressed only the constitutionality of the Florida death penalty statute on its face. Proffitt did not raise the issues of unconstitutional application of the statute or ineffective assistance of counsel on direct review in the Supreme Court; and the state does not argue that he waived them by failing to do so.

(1979), [3] and finally in the federal district court, the decision of which denying habeas corpus is the subject of this appeal. In the district court appellant urged several grounds for relief. He claimed the representation he

3.

The state does not contend that appellant failed to exhaust state remedies with respect to any of the claims raised here.

received at the guilt phase of his trial was ineffective rendering his conviction unconstitutional under the sixth amendment. He also raised several constitutional challenges to the state court's sentencing decision, including (1) ineffective assistance of counsel at the penalty hearing; (2) admission of testimony and reports by court-appointed psychiatrists without adequate opportunity for confrontation; (3) limitation of the jury's consideration of mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and (4) consideration of aggravating factors not authorized by the sentencing statute in violation of the due process clause and eighth amendment.[4]

4. Appellant raised several other issues in the district court concerning both the guilt and sentencing phases of his trial, (cont'd on next page)

The district court appointed a magistrate [5] to conduct the evidentiary hearing required by Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). The magistrate, after thorough and probing analysis, recommended denial of relief on all of appellant's claims except that based on ineffective assistance of

all of which were decised against him below. This appeal is limited to the claims described in the text of this opinion.

5. The 1976 amendments to the Federal Magistrates Act authorize appointment of magistrates to conduct evidentiary hearings and submit proposed findings of fact and recommendations for disposition in federal habeas cases. See 28 U.S.C.A. §636(b)(1)(B) (West Supp. 1982). These amendments were intended to overrule Wingo v. Wedding, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974), which had held that the Magistrates Act did not authorize magistrates to hold evidentiary hearings on habeas cases. H.Rep.No. 1609, 94th Cong., 2d Sess. 5-6 (1976), reprinted in [1976] U.S.Code Cong. & Ad.News 6162, 6164-65. See United States v. Raddatz, 447 U.S. 667, 674, 100 S.Ct. 2406, 2411, 65 L.Ed.2d 424 (1980); Nettles v. Wainwright, 677 F.2d 404, 406-407 (5th Cir. 1982) (en banc).

counsel at the sentencing stage of the trial.[6] As to the latter, he found defense counsel's representation constitutionally deficient and recommended remand to the state court with instructions either to conduct a new sentencing hearing or, alternatively, to resentence appellant to life imprisonment. The district court adopted the magistrate's findings and recommendations on all issues except the last. It rejected the claim of ineffective counsel at sentencing and the magistrate's conclusion on that ground and thus dismissed appellant's habeas petition. Appellant challenges the district court's substantive conclusions and further argues

6. Both parties filed objections to the magistrate's report as required by 28 U.S.C. § 636(b)(1) and Rule 6.02, Local Rules of the United States District Court, Middle District of Florida. See Nettles v. Wainwright, supra.

that the district court committed procedural error in rejecting the magistrate's recommendation on his ineffective counsel claim without conducting a new hearing on that issue. We address the procedural question first because its resolution, if favorable to appellant, would require a remand to the district court obviating the need for us to decide most of appellant's substantive claims at this juncture. Since an understanding of the operation of the Florida capital sentencing statute under which appellant was sentenced is necessary for informed evaluation of both the procedural and substantive issues, we preliminarily set forth a brief description of that act and of the sentencing proceeding in this case.

II. Florida's Capital Sentencing Statute

Under Fla.Stat. §921.141,[7] following the guilt phase of trial for a defenant convicted of a capital felony, the trial judge conducts a separate sentencing proceeding before the jury that convicted the defendant. At the sentencing hearing,

7. The current version of Florida's capital sentencing statute, which has been amended four times since appellant was sentenced, is at Fla.Stat.Ann. §921.141 (West Supp. 1982). The precise version of the statute in effect at the time of appellant's sentencing is no longer printed in the Florida Statutes. The only significant change made by the amendments is described in note 19 infra.

the parties may introduce evidence of and argument concerning aggravating[8] and

8. The aggravating circumstances that may be considered are expressly limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel. Fla.Stat.Ann. § 921.141(5) (West Supp.1982).

mitigating factors.[9] On the basis of the evidence presented at the sentencing hearing together with that presented at the

9. The mitigating circumstances enumerated in the statute include the following:
(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.
Id. § 921.141(6).

guilt phase of the trial,[10] a majority of the jury renders an advisory sentence. Fla.Stat.Ann. § 921.-141(2), (3) (West Supp.1982). The jury is instructed to consider "[w]hether sufficient aggravating circumstances exist"; "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist"; and, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Id. § 921.141(2). The trial judge then independently evaluates the evidence, makes the same determination as to the existence of aggravating and mitigating

10. The judge instructed the jury that, in determining whether aggravating or mitigating circumstances existed, it should consider "the evidence which you have heard while trying the guilt or innocence of the defendant and evidence which has been presented to you in [the sentencing] proceedings."

factors, and decides which sentence to impose. Id. § 921.141(3).[11]

In this case, the sentencing proceeding was brief. The prosecution called one witness: a Dr. Crumbley who, acting as psychiatric consultant for the County Sheriff's Office, had examined appellant shortly following his arrest.[12] In the

11. Although the statute leaves the trial judge free to reject the jury's recommendation, the Florida Supreme Court has developed a strict standard of review in cases where a judge imposes the death penalty in the face of a jury recommendation favoring life imprisonment. See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

12. Appellant apparently had asked to see the jail psychiatrist. See IV Trial Record 503.

course of two interviews with the doctor, appellant had confessed to committing the murder. Appellant's attorney waived his doctor-patient privilege for purposes of sentencing only, allowing the doctor to testify.

On direct examination, Dr. Crumbley testified that appellant had expressed concern about a feeling he had that was "so overwhelming that he felt he would do damage to people in the future." Dr. Crumbley testified that appellant told him his uncontrollable desire had built up an unbearable tension, which he had "fought as hard as he could," but that it finally overcame him with the result that he killed a man and was now awaiting trial. Appellant had further expressed concern that if he was acquitted he might kill someone again, and he asked Dr. Crumbley about arranging psychiatric help for him.

At a second interview, appellant again spoke of the tension he had experienced prior to the killing and described a sense of relaxation he had felt afterward. He told the doctor the tension was building up again with his hostility directed toward a particular inmate. He asked whether he could be moved to a different cell or whether something could be done to relieve the emotional pressure he was experiencing. Dr. Crumbley further testified that appellant killed the victim (who was a total stranger to him) solely to satisfy his emotional tension and that in Crumbley's opinion appellant could be dangerous to society and to other inmates. Dr. Crumbley stated that his two interviews with appellant took fifteen to twenty minutes each and that he had performed no psychiatric or psychological testing.

Appellant's counsel then cross-examined the doctor, eliciting his opinion that appellant was acting under extreme, uncontrollable emotional distress when he committed the murder, that appellant "couldn't help what he did," that appellant's condition was treatable, and that if treated appellant would no longer be dangerous. Dr. Crumbley explained that there were confinement facilities specializing in treatment of individuals with the kind of emotional disturbance suffered by appellant.

Defense counsel called no witnesses, and following the doctor's testimony the attorneys argued briefly concerning the aggravating and mitigating factors enumerated in the Florida capital sentencing statute. The prosecuting attorney argued that five of the

aggravating factors[13] and none of the mitigating factors[14] were present.

13. The prosecuting attorney introduced evidence of appellant's prior conviction for breaking and entering in support of aggravating factor (b) (prior conviction of felony involving violence). He argued on the basis of the evidence presented at the guilt stage that factors (c) (great risk of death to many persons), (d) (felony-murder,) (f)(felony committed for pecuniary gain), and (h) (offense especially heinous, atrocious, or cruel) had been established.

14. The prosecuting attorney argued that mitigating factor (a) (no significant history of prior criminal activity) had been rebutted by evidence of appellant's prior conviction for breaking and entering. He also contended that the defense attorney's attempt to establish factors (b) (crime committed while defendant was under extreme mental or emotional distress) and (f) (defendant's ability to appreciate criminality of (cont'd on next page)

Appellant's counsel argued that at most the prosecution had established only one aggravating factor [15] and that this was

conduct or to conform conduct to law substantially impaired) failed because Dr. Crumbley was not a practicing psychiatrist and had not performed any psychiatric testing of appellant. He argued that the other statutory mitigating factors were not present because no evidence had been presented in their favor.

15. Initially appellant's counsel argued that the felony-murder circumstance was inapplicable because appellant had entered the victim's house with the sole purpose of killing and not intending to commit any other crime. After the judge sustained the prosecution's objection to this argument on the ground that breaking and entering for any purpose constituted a burglary within the felony-murder circumstance, the defense attorney conceded that this factor might be established.

outweighed by the mitigating evidence.[16]

III. Procedural Issue

In 1976, Congress expanded district courts' delegatory authority by permitting appointment of magistrates to conduct

16. Defense counsel argued that the following mitigating circumstances were present: (a)(no significant history of prior criminal activity), (b) (crime committed while defendant was under influence of extreme emotional disturbance), (e)(defendant acted under extreme duress), and (f) (defendant's capacity to conform his conduct to the requirements of law was substantially impaired). Counsel also reminded the jury of the doctor's statement that there were institutions where appellant could be treated and emphasized that a life sentence would require appellant to serve a minimum jail term of 25 years.

evidentiary hearings in federal habeas cases. See note 5 supra. In United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), the Supreme Court, interpreting the Federal Magistrates Act, held that a district court judge need not rehear the testimony on which the magistrate relied in accepting the magistrate's findings or recommendation. Rather, the Court held, the statutory command to district court judges to "make a de novo determination" of those portions of the magistrate's findings and recommendations to which the parties object is satisfied as long as the judge, rather than the magistrate, exercises "ultimate adjudicatory power." Id. at 674-76, 100 S.Ct. at 2411-12. The Court also held that this arrangement does not violate the due process clause or article III of the Constitution. Id. at 677-84, 100 S.Ct. at

2413-16. The Court left open the question whether a district court judge may constitutionally "reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal ... without seeing and hearing the witness or witnesses whose credibility is in question." Id. at 681 n.7, 100 S.Ct. at 2415 n.7. The Fifth Circuit addressed the latter issue in Louis v. Blackburn, 630 F.2d 1105 (5th Cir. 1980).[17] It held that in cases involving

17. In the en banc decision of Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the former Fifth Circuit

the constitutional rights of a criminal defendant due process requires that before entering an order inconsistent with the credibility choices made by a magistrate, a district court judge must himself hear the testimony of witnesses whose testimony is determinative. Id. at 1109.

Appellant argues that the district court judge's rejection, without hearing testimony, of the magistrate's recommendation concerning his ineffective counsel claim was erroneous under Luis v.

Blackburn. Determining whether the judge's order is "inconsistent with credibility choices made by the magistrate" is a two-step process. First, we must review the magistrate's recommendation and decide whether credibility choices he made in assessing appellant's ineffective counsel claim were dispositive. If the answer is affirmative, we must then scrutinize the district court's order to ascertain if the judge's rejection of the magistrate's recommendation was also a rejection, whether express or implicit, of the magistrate's credibility chocies. See id. at 1107-08.

In support of his ineffective counsel claim, appellant presented to the magistrate numerous detailed allegations concerning the defense attorney's actions before trial, at the guilt stage of the trial, and at the sentencing phase. The

magistrate rejected all of appellant's ineffective counsel arguments except that based on the sentencing phase, and the district court adopted the magistrate's findings with respect to the pre-sentencing claims. Hence, appellant's Louis v. Blackburn due-process challenge is limited to his claim of ineffective counsel at sentencing, on which the magistrate and judge disagreed.

The magistrate concluded appellant had received ineffective assistance at the penalty hearing due to five flaws in defense counsel's representation: (1) the attorney's failure to present any mitigating evidence, (2) his consent to the admission of Dr. Crumbley's testimony, (3) his failure to request a presentence investigation report, (4) his failure to explain the circumstances of appellant's prior conviction, and (5) the brevity of

his argument. The magistrate's conclusion that these omissions, viewed cumulatively, amounted to ineffective assistance of counsel was based partly on his analysis of the constitutional requirements for sentencing in capital cases and partly on his assessment of the reasons for the attorney's failure to ensure those requirements were met at Proffitt's trial. The district court addressed each of the bases for the magistrate's conclusion that appellant received ineffective assistance of counsel and rejected all five. We now consider whether the magistrate's conclusions on these issues were based on credibility choices concerning testimony at the evidentiary hearing and, if so, whether the district court's disagreement with the magistrate involved a rejection of such credibility choices.

A. Failure to Present Mitigating Character Evidence.

1. The Evidence

[1] Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), established a constitutional requirement in capital cases that the sentencing authority consider all mitigating evidence proffered by the defendant relating to his character and record and to the circumstances of the particular offense. Appellant's trial took place in 1974, some four years prior to the Supreme Court's decision in Lockett. At that time, the rule had not yet been established that the Constitution compels consideration of all relevant mitigating character evidence. Moreover, although the Supreme Court subsequently interpreted the Florida statute as not limiting sentencer

consideration of mitigating evidence,[18] the

18. Despite a contrary interpretation of the statute by the Florida Supreme Court in Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), the U.S. Supreme Court stated in Lockett v. Ohio, 438 U.S. 586, 606-07 & n.15, 98 S.Ct. 2954, 2965-66 & n.15, 57 L.Ed.2d 973 (1978) and the Fifth Circuit held in Spinkellink v. Wainwirght, 578 F.2d 582, 620-21 (5th Cir. 1978) that the Florida death penalty statute did not, at the time Proffitt was decided by the Supreme Court, "operate[] ... to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Id. at 621 (quoting Lockett v. Ohio, 438 U.S. at 607, 98 S.Ct. at 2966).

ambiguous wording of the statute left open the question whether that act allowed consideration of mitigating character evidence other than that falling within the statutorily enumerated factors.[19]

19. The statute prefaces the list of aggravating circumstances with the statement that they "shall be limited to the following: . . ." Fla.Stat.Ann. § 921.141(5)(West Supp.1982). The list of mitigating factors is preceded by the words" "Mitigating circumstances shall be the following: . . ." Id. § 921.141(6). After Lockett, the Florida Legislature amended the statute so that it now expressly allows presentation of evidence at the sentencing hearing "as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." 1979 Fla.Laws, c. 79-353. See Fla.Stat.Ann. § 921.141(1) & note (West Supp. 1982).

At the sentencing phase of appellant's trial his counsel presented no evidence of his character or personal history.[20] The attorney's testimony at the magistrate's evidentiary hearing indicates that, at the time of appellant's trial, he understood the Florida statute as limiting the mitigating evidence that could be introduced to that falling within the statutory mitigating circumstances. Transcript of Evidentiary Hearing 190-91,

20. The attorney relied almost entirely on Dr. Crumbley's testimony, which was introduced by the prosecution, arguing that it established several of the statutory mitigating factors. See note 16 supra.

218-20. In a pre-trial motion to dismiss the indictment the defense attorney asserted inter alia that the Florida death-penalty statute unconstitutionally limited presentation of mitigating evidence.[21] The trial judge denied the motion, however, and defense counsel made no further attempt to

21. During the evidentiary hearing, defense counsel described the portion of the pre-trial motion pertaining to mitigating evidence as "a rather lengthy paragraph, [] basically [saying] that the matters ought to be dismissed because the circumstances to be considered in mitigation are inadequate, discretionary, arbitrary, insufficient and vague, in violation of certain provisions of the Constitution of the United States and the State of Florida." Transcript of Evidentiary Hearing 218-20.

introduce nonstatutory evidence. Although the attorney testified that his interpretation of the statute influenced his decision as to what evidence to present at the sentencing hearing, he suggested that other reasons were important as well. In particular, he stated that he believed that he could fit any mitigating evidence within the statutory mitigating factors, id. at 191-92, and that, in any event, the defendant had instructed him not to introduce any mitigating evidence. Id. at 220-21.

2. The Magistrate's Findings.

In assessing whether defense counsel's failure to present mitigating evidence constituted ineffective assistance, the magistrate recognized that Proffitt was one of the first capital cases tried under the then newly-enacted Florida death-penalty statute and that Proffitt's trial preceded

the Lockett decision by several years. The magistrate did not believe the attorney's "misperception of the law" was excused, however, by the indefiniteness of that constitutional rule at that time. The magistrate accepted defense counsel's testimony "that he went into the trial assuming that he could not put on any evidence in mitigation except as set forth in the statute." Nonetheless, the magistrate concluded that the subsequent Supreme Court holding against limiting mitigation evidence was reasonably foreseeable and that the attorney had in fact anticipated it. The magistrate rejected defense counsel's statement that he introduced no mitigating evidence pursuant to an instruction from appellant based on his not wanting to spend twenty-five years

in jail.[22] The magistrate also rejected respondent's assertion that defense counsel failed to present mitigating evidence because no such evidence was available. The magistrate relied on a written proffer of evidence submitted by appellant in finding that the attorney could have

22. In the magistrate's view, counsel was "confusing his client's disinterest in a plea bargain and the matter of adducing mitigating evidence." The magistrate found, moreover, that the attorney's attempt to introduce mitigating evidence through Dr. Crumbley's testimony and argument against the death penalty at the time of sentencing were inconsistent with his claim that he was operating under instructions from appellant not to seek mitigation of the sentence.

procured favorable character evidence to present at the penalty phase. In addition to the proffer, defense counsel's testimony that he did not call appellant's mother because he could not think of any reason to do so except for "the possible sympathy that it might have evoked from the jury," instead of supporting counsel's decision, in the magistrate's view bolstered appellant's claim that she should have been called as a witness to testify concerning appellant's character and personal history. The magistrate attributed defense counsel's failure to present mitigation evidence to a "lack of preparation" as well

as to a mistake of law.[23]

In summary, the evidence considered by the magistrate on the issue of defense

23. The magistrate noted:

Levinson testified that he went into the trial assuming that he could not put on any evidence in mitigation except as set forth in the statute (H.T.220). Levinson stated further that he did not engage in any separate and distinct preparation for the penalty phase, but prepared for that part of the trial in conjunction with his preparation of the case as a whole (H.T. 186). He also said that he had no strategy for the penalty stage, but that his approach to that stage was to depend upon what occurred during the guilt phase (H.T. 187). Since there was only a thirty-five minute recess between the first and second stages of the trial, Levinson had no additional opportunity to prepare for the sentencing hearing after the guilty verdict was rendered (IV R.492, 493).

counsel's assistance inadequate. The magistrate disbelieved defense counsel's statement that he was following counsel's failure to present mitigating evidence included (1) the trial record (including pre-trial motions filed by defense counsel), (2) defense counsel's testimony at the evidentiary hearing, and (3) a written proffer of evidence submitted by appellant. The testimonial evidence he referred to in his memorandum included the defense attorney's statements concerning his understanding of the law respecting the Florida death penalty statute, his description of his preparation for the penalty stage of trial, and his statement that his failure to introduce mitigating evidence was in response to appellant's instructions. The magistrate accepted the attorney's testimony as to his interpretation of the statute and his prepar-

ation for the penalty stage of trial; indeed, the magistrate relied on this testimony in finding counsel's assistance inadequate. The magistrate disbelieved defense counsel's statement that he was following Proffitt's instructions in not introducing mitigating evidence, however, and the rejection of this testimony was critical to the magistrate's decision.

3. The District Court's Opinion

The district court disagreed with the magistrate's conclusions concerning defense counsel's failure to introduce mitigating evidence at the penalty stage. The judge's disagreement stemmed primarily from a difference in his interpretation of the standard for judging ineffective assistance of counsel claims rather than from differences in view of the evidence.

The judge agreed with the magistrate that defense counsel had labored under the

impression that evidence in mitigation was limited to the specific mitigating circumstances enumerated in the statute. He disagreed, however, with the magistrate's conclusion that defense counsel had erroneously interpreted the law as it existed at the time of trial. The attorney's "misapprehension of the law," the judge found, could "only be characterized as a misapprehension through hindsight which has the advantage of Lockett v. Ohio decided four years later." The attorney's belief that evidence in mitigation was limited to the statutory circumstances was, in the judge's view, "understandable," and his inclusion in a "comprehensive" pre-trial motion of the contention that, as such, the statute was unconstitutional did not undermine that conclusion.

The judge disagreed with the magistrate's assessment of the evidence inso-

far as the magistrate attributed counsel's omission to insufficient preparation rather than unavailability of mitigating evidence. The judge cited the defense attorney's testimony concerning his general preparation for trial --testimony not referred to in the magistrate's memorandum. The judge relied on the attorney's statements that he had met with appellant weekly to discuss the case, that he had engaged the assistance of an investigator, that he had talked to witnesses in Tampa who knew and worked with

appellant, and that he had personally traveled to Connecticut to interview members of appellant's family. Moreover, the judge found convincing the attorney's testimony that he had not called appellant's sister as a mitigating witness because she had a criminal record; that he had not called appellant's half-brother because he and appellant "had not had a relationship for some time"; that he had not called appellant's mother because she was ill and therefore unable to travel from Connecticut to Florida for the trial, because appellant did not want to get his family involved, and because the attorney felt appellant's mother had nothing of substance to contribute in any event; and that he had not called appellant's wife because he did not feel she would make a good witness since she was unhappy with appellant's lifestyle and because he was

concerned that calling her to testify might constitute waiver of the marital privilege, which appellant had asserted to prevent her from testifying at the guilt phase of trial.

[2,3] In accepting the above-described testimony, the judge did not reject any credibility determinations implicitly made by the magistrate in violation of Louis v. Blackburn, supra. Although the magistrate ultimately concluded that the attorney's failure was the product of his "misperception of the law" and "not the result of tactical considerations," nothing in the magistrate's findings indicates he did not credit the above testimony. First, the magistrate's acceptance of appellant's proffer describing mitigating evidence that could have been introduced does not indicate that he rejected the defense attorney's testimony concerning why he did

not present certain witnesses. In addition to appellant's relatives, whom the defense attorney declined to call, the proffer lists as possible witnesses several other persons, including one of appellant's supervisors and a psychiatrist who examined appellant after trial. The magistrate without accepting "all the details in the proffer as true," simply found that information is contained generally indicated that the defense attorney could have called character witnesses on appellant's behalf. Since the magistrate did not expressly reject the defense attorney's testimony as to why he did not call certain of the enumerated witnesses, the only conclusion one can draw from his partial reliance on the proffer is that he felt it probable the attorney could have called some of the witnesses listed by appellant in the proffer and not that the

reasons the attorney gave for rejecting particular witnesses were not believable. The district court judge, on the other hand, rejected appellant's written proffer of evidence, correctly concluding that the magistrate's reliance on the proffer was improper. Even if the proffer had constituted competent evidence, however, rejection by the judge of such nontestimonial evidence would not require a second evidentiary hearing under Louis v. Blackburn. Second, the magistrate's memorandum does not evince disbelief of the defense attorney's description of his general preparatory efforts. Rather, the magistrate thought the attorney's failure to plan a separate strategy for the sentencing phase rendered his assistance inadequate irrespective of whatever other preparatory efforts the attorney undertook before and during trial. Nor does the

district court's contrary conclusion indicate that the judge disbelieved the defense attorney's testimony, which the magistrate accepted, to the effect that the attorney engaged in no special preparation for the penalty phase; the judge simply disagreed that such separate preparation was required to meet the legal standard of reasonably effective counsel. We conclude that the judge's rejection of the magistrate's recommended ruling that defense counsel's failure to present mitigating evidence rendered his representation inadequate did not depend on differences in credibility choices requiring a rehearing under Louis v. Blackburn.

B. Absence of Presentence Investigation

The magistrate concluded that defense counsel erred by failing to request a

presentence investigation report. Such investigation he found was necessary to provide information on appellant's character and background, on which no other information in the record had shed any light. Moreover, because "the only view the jury and the judge had of the petitioner was the impersonal picture drawn by Dr. Crumbley of an obsessed killer;" presentation to the sentencers of information about appellant's personality and characteristics could be critical.

The defense attorney's testimony at the evidentiary hearing on this point was as follows:

> Q Do you believe there was a pre-sentence investigation?
> A Should have been.
> Q If there was not one, should you have asked for one?
> A Should have been automatic.
> Q Why would it be automatic?
> A Well, let me put it this way. I know it's automatic now unless waived by statutory authority. Whether the statute was in effect

> at the time of Proffitt's trial, I can't tell you. But I do recall a pre-sentence investigation being run.
> Q Did you recall that there was a pre-sentence investigation?
> A I think so.
> Q And if there hadn't been one, should you have asked for one?
>
> * * * * * *
>
> A If there were such things as pre-sentence investigations then, and I think there were, I should have asked for one.

Transcript of Evidentiary Hearing 275-76.

As the magistrate noted, the record indicates that no presentence investigation was conducted for Proffitt's trial. The magistrate's conclusion that counsel's failure to demand such an investigation constituted ineffective assistance rested partly on the magistrate's opinion that the Crumbley testimony, which presented a very negative picture of appellant's character, created a strong need for "humanizing information" about appellant. The

magistrate also viewed the statement by the attorney at the evidentiary hearing that he "should have asked for" a presentence investigation as an admission that he erred in not doing so.

The district court judge, noting that the attorney's testimony "was given from unaided memory more than five years after the trial," found it "noteworthy that counsel in his testimony talked about 'now' as distinguished from 'then.'" The judge observed that the Florida rule governing presentence investigation reports in criminal cases was amended shortly before appellant's trial to extend authorization for trial courts to order presentence investigations from only "cases in which probation is authorized by law" to "all cases in which the court has discretion as to what sentence may be imposed." Compare Rule 1.790, Fla.R.Crim.P. [adopted by

Florida Supreme Court, 196 So.2d 124 (1967) (effective Jan. 1, 1968), as amended by 211 So.2d 203 (Fla. 1968) and 253 So.2d 421 (Fla. 1971)] with Rule 3.710, Fla.R.Crim.P. [adopted by Florida Supreme Court, 272 So.2d 65 (Fla. 1972); codified at 34 Fla. Stat. Ann. §3.710 (West 1975)]. Although the language of the new rule seems to encompass capital cases (as compared with the old rule, which was expressly limited to cases in which probation could be granted,) the Committee Note indicates it was not intended to cover capital cases.[24] The district court judge

[24]The Note states:
The rule provides for the utilization of a presentence report as part of the sentencing process. While use of the report is discretionary in all cases, it is mandatory in two instances, the sentencing of a first felony offender and of a defendant under 18 years of age. Of course, no report is necessary where the specific sentence is mandatory, e.g., the sentence of death or life imprisonment in a
(cont'd on next page)

recognized that later cases have held Rule 3.710 neither requires nor precludes presentence investigaitons in capital cases, see Thompson v. State, 328 So.2d 1 (Fla. 1976); Songer v. State, 322 So.2d 481 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975). Nonetheless, he found that "at the time of Petitioner's trial in 1974, both historical as well as contemporary

verdict of first degree murder (emphasis added).

At the time of appellant's trial, some Florida judges were ordering presentence reports in capital cases under Rule 3.710 notwithstanding the Committee Note's suggestion that the rule does not encompass such cases. See, e.g., Gardner v. State, 313 So.2d 675, 677 (Fla. 1975) (opinion of Ervin, J.), rev'd, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Although the Florida Supreme Court upheld the sentence in Gardner, that case indicates the doubtful status of presentence investigations in capital cases at the time. The defendant argued to the Florida Supreme Court that the trial judge had erred in considering the presentence report because it contained detrimental facts about him that did not fit within the aggravating circumstances enumerated in the capital sentencing statute. Id. at 677-78.

legal opinion and authority was to the effect that presentence investigation reports were not customary or necessary in capital cases; and, in fact, there was a serious question at the time that the use of a presentence report might even be error."[25]

[25]Complicating the question of presentence investigation reports even further, the Florida Legislature in 1974 enacted a statute purporting to make preparation of such reports mandatory in all felony cases in which a guilty verdict has been rendered and discretionary in misdemeanor cases. See Fla. Stat. Ann. §921.231 (West Supp. 1982). This statute did not become effective until July 1, 1974, and hence it had no effect on the law at the time of appellant's trial. As the district court noted, however, this later statute explains defense counsel's statement that presentence investigations are "automatic now ... by statutory authority." That the statute was enacted at a point in time so close to appellant's trial also tends to explain the attorney's inability to remember whether it was in effect at the time of the trial. (The Florida Supreme Court has held that, to the extent it conflicts with Rule 3.710 by making presentence investigations mandatory rather than discretionary in most felony cases, (cont'd on next page)

[4,5] The district judge's disagreement with the magistrate on whether counsel's failure to request a presentence investigation constituted ineffective assistance directly concerns the attorney's testimony at the evidentiary hearing. In some sense, the disagreement can be viewed as a difference in interpretation of that testimony. The difference was not a matter of credibility, however. This is not a situation in which the magistrate believed the attorney was telling the truth but the district court disbelieved his testimony. Rather, the magistrate interpreted the attorney's statement as a simple admission

the statute unconstitutionally invades the rulemaking province of that court, and thus is to be construed as directory only. See Huntley v. State, 339 So.2d 194 (Fla. 1976). It may be that trial courts in Florida have nonetheless continued to comply with the statute's directive by making presentence investigations "automatic.")

that he should have requested a presentence investigation, while the district judge interpreted it as a conditional admission that he should have requested one if the law authorized such investigations at the time of Proffitt's trial. These circumstances thus present us with an issue we have not previously faced: whether the reasoning of Louis v. Blackburn, supra, requires that a district court judge conduct a new evidentiary hearing when the judge's interpretation of a witness's testimony differs from that of the magistrate on a point critical to decision of the issue to which the testimony is relevant.

The rationale for requiring district judges to rehear testimony before rejecting credibility choices made by a magistrate lies in the recognition that credibility choices frequently depend on the trier of

fact's assessment of the witness's demeanor. Obviously, observation of such factors as witnesse's facial expressions and tone of voice cannot be observed by reading a "cold and impersonal written transcript." See Louis v. Blackburn, 630 F.2d at 1110. These factors not only reflect on the witness's credibility (i.e., on his sincerity and the degree of certainty with which he asserts matters about which he testifies) but may also reflect on the meaning the witness intends by the words he uses when such meaning is unclear from the words alone. We thus do not hold that a judge need never rehear testimony when he attributes a different meaning to words uttered by a witness than the meaning ascribed to them by the magistrate. Unless the words spoken by the witness are inherently ambiguous, however, the decision whether a second hearing is

necessary must be left to the sound discretion of the district judge.

In the case before us, the witness's testimony was not inherently unclear. The attorney's remark that "if there were such things as pre-sentence investigations then, ... I should have asked for one," itself suggests that at some point relevant to the period in question there was a change either in the law or in practice with respect to conducting presentence investigations. The magistrate made no apparent attempt to decipher the attorney's ambiguous reference to change and interpreted the attorney's testimony without the benefit of such understanding. The district judge, on the other hand, determined what changes had occurred and took them into consideration in interpreting the attorney's testimony. When viewed in the context of the changes

in Florida's law governing presentence investigations that occurred shortly after Proffitt's trial, the import of the defense attorney's statement becomes clear: if Proffitt's trial took place after the statute requiring presentence investigations in felony cases was enacted, see note 25 supra, then he should have requested such an investigation; if the trial took place before it became clear that such investigations were proper in capital cases, however, he was admitting to no such obligation. Since the defense counsel's testimony was not inherently vague, and since any uncertainty it presented was resolvable by reference to matters within the judicial notice of the court, J. M. Blythe Motor Lines Corp. v. Blalock, 310 F.2d 77 (5th Cir. 1972) (federal courts will take judicial notice of state laws without requiring proof

thereof), the district judge did not abuse his discretion in rejecting the magistrate's interpretation of that testimony without rehearing the witness.

C. Failure to Object to Admission of Crumbley Testimony

At the penalty stage of appellant's trial, the defense attorney waived appellant's doctor-patient privilege and allowed the prosecutor to introduce Dr. Crumbley's testimony. After cross-examining the doctor, he argued that the testimony established two mitigating circumstances: that the crime was committed while appellant was under extreme mental or emotional stress and that appellant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially

impaired.[26] The prosecutor countered these arguments by contending that the doctor's opinions concerning appellant's mental state were not reliable because the doctor had no psychiatric credentials and had performed no psychiatric tests on appellant. The prosecutor argued further that the doctor's testimony showed appellant was likely to kill other people in the future and was therefore a danger to society--an argument not justified by any of the statutorily enumerated aggravating circumstances but nonetheless likely to appeal to the emotions of the jurors.

[26]Defense counsel also argued that Crumbley's testimony established the statutory mitigating circumstance that "[t]he defendant acted under extreme duress or under the substantial domination of another person," see Fla. Stat. Ann. §921.141(6)(e) (West Supp. 1982), but the trial judge sustained the prosecution's objection to this argument.

At the evidentiary hearing, the attorney testified that he allowed the introduction of the doctor's testimony because he thought it would establish mitigating circumstances. He also stated that he had hoped the trial judge, who under the Florida statute renders the final decision on sentencing, "would be able to cut through the emotional impact of that information, recognize it as a mitigating circumstance, and rule in accordance with that recognition."

The magistrate concluded that defense counsel's failure to object to the admission of Dr. Crumbley's testimony was so grievous an error that "a substantial contention can be made that this failure alone constitutes ineffective assistance of counsel." In the magistrate's view, the introduction of this "frightening" testimony was unnecessary to obtain

evidence of psychiatric mitigating circumstances because the attorney could have obtained other psychiatric opinions through a privately employed psychiatrist. Moreover the magistrate noted that Dr. Crumbley's "opinion as to whether the petitioner was laboring under emotional distress or a substantial mental impairment did not carry much force" in light of his lack of psychiatric credentials. At the very least, the magistrate concluded, "the use of Dr. Crumbley's testimony significantly increased the need to present humanizing information in order to counteract the dramatic impact of that testimony."

The district court judge disagreed that the attorney's decision to waive appellant's privilege constituted ineffective assistance of counsel. The judge found that the record of the penalty

hearing, as well as defense counsel's testimony at the habeas hearing, showed that the attorney had had a "cogent reason" for his decision: "[t]he Petitioner had already been found guilty at that point in the proceeding and counsel expected to develop on cross-examination the existence of two of the statutory mitigating circumstances, namely, that the Petitioner acted 'under the influence of extreme mental or emotional disturbance,' and that 'the capacity of the defendant ... to conform his conduct to the requirements of law was substantially impaired.'" The judge found that defense counsel's cross-examination of the doctor at the penalty hearing was clearly directed toward developing the enumerated mitigating circumstances and that his argument at the habeas hearing reinforced the conclusion that development of those circumstances was

the basis for his waiving the privilege. The judge disagreed with the magistrate's statement that Crumbley's testimony was unnecessary to establish the statutory mitigating factors:

> [T]he magistrate's reasoning is further flawed on this point because it presupposes the contemporary availability of such testimony from other qualified sources. The fact is that two other practicing psychiatrists subsequently appointed by the trial judge failed to support Dr. Crumbley's view concerning the mitigating circumstances about which he testified. Defense counsel used what he had, and it may well have been all he could get.

[6] The judge's disagreement does not rest on rejection of credibility choices made by the magistrate. The factors on which the magistrate's conclusion rested included (1) the content of appellant's conversations with Dr. Crumbley, which the magistrate found to be "frightening"; (2) the doctor's "lack of psychiatric

credentials," which in the magistrate's view rendered his opinion "without much force"; and (3) a presumption that other psychiatric opinions supportive of the statutory mitigating circumstances could have been obtained. The magistrate did not derive any of these considerations from testimony given at the evidentiary hearing, nor could he have done so. The facts involved were all taken from the record of the penalty hearing, with the exception of the question of availability of alternative favorable psychiatric testimony, which may have been based partly on information contained in appellant's proffer. As noted above, the judge was not required to accept the written proffer. Neither, of course, was he required to accept the magistrate's assessment of facts contained in the trial record.

Although the district judge's opinion indicates that he gave credence to defense counsel's testimony concerning the reasons for his decision to waive appellant's privilege, that testimony was not mentioned by the magistrate. The testimony established that despite the frightening nature of the evidence and its potential negative emotional impact on the jury, the defense attorney "hope[d]" that the judge would recognize it as a mitigating circumstance. Not only did the magistrate not explicitly reject this testimony, but such rejection is not implicitly required by his conclusion. See Louis v. Blackburn, 630 F.2d at 1108.

D. Failure to Explain Prior Conviction

[7] Under the Florida capital sentencing statute, prior criminal conduct by a defendant is relevant to sentencing in

two respects. First, a defendant's prior conviction for "another capital felony or [] a felony involving the use or threat of violence to the person" may be considered by the sentencer as an aggravating circumstance. Fla. Stat. Ann. §921.141(5)(b) (West Supp. 1982). Second, that "[t]he defendant has no significant history of prior criminal activity" is a statutory mitigating circumstance. Id §921.141 (6)(a).

At the sentencing phase of appellant's trial, the prosecution introduced a certified copy of a judgment of conviction against appellant for "Breaking and Entering Without Permission." The defense attorney made no attempt to explain the circumstances of this conviction, and appellant claims that the facts render the conviction insignificant either as an aggravating circumstance or to rebut the

mitigating one.[27] The magistrate accepted the explanation of the conviction provided by appellant in his written proffer and concluded that defense counsel should have presented these facts in rebuttal. No testimony or other evidence was presented to the magistrate either by the state or by appellant concerning the circumstances surrounding appellant's prior offense.

The district judge rejected the magistrate's conclusion that the defense attorney should have presented evidence to explain or rebut the prior conviction. Citing United States v. Gray, 565 F.2d 881, 887 (5th Cir.), cert. denied, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978), the district court stated that, in its view,

[27]Specifically, appellant claims he was convicted after being found inside a restaurant eating a hotdog while intoxicated, without having done any damage to the property.

the magistrate mistakenly accepted "speculative and inconcrete claims of 'what might have been if.'" The judge's primary basis for disagreement, however, was his conclusion, after reviewing the record of the penalty hearing, that "[t]he matter of Petitioner's prior conviction was a low profile subject which, in terms of Petitioner's best interests at that time, might well have been handled by his counsel with utmost skill in choosing to leave it that way." Neither the magistrate's nor the judge's conclusions on this issue were based on any testimony at the evidentiary hearing; the opinions of each and the disagreement between them were based solely on appellant's written proffer and on a review of the trial transcript for the penalty phase. Hence Louis v. Blackburn, supra, provides no basis for challenging

this portion of this district judge's order.

E. Brevity of Argument

Similarly, the magistrate's comment that the generality and brevity of the defense counsel's argument at the sentencing hearing "adds weight" to appellant's ineffective counsel claim and the district judge's disagreement with that statement were based on their differing views about facts contained in the trial record and not on any evidence brought out at the evidentiary hearing.

F. Conclusion

For the reasons stated above, we find that the district court's disagreement with the magistrate on appellant's ineffective counsel claim did not turn on rejection of credibility choices made by the magistrate. Hence appellant was not

entitled, under Louis v. Blackburn, supra, to a second evidentiary hearing.

IV. Substantive Issues

A. Ineffective Assistance of Counsel at Guilt Phase

[8,9] Appellant contends his attorney's representation at trial was inadequate to meet minimum constitutional standards. This contention involves the testimony of the prosecution's key witness, a boarder named Mary Bassett who resided with appellant and his wife in their trailer. Bassett testified at trial that she was awakened early on the morning of the murder and overheard a conversation between appellant and his wife in which appellant related the facts of the killing. Appellant's attorney filed a pre-trial motion to suppress this testimony on the ground that the conversation was a confidential communication between

appellant and his wife and therefore was privileged under Florida law. The attorney renewed the objection at the close of the testimony and, after an adverse ruling on that issue and appellant's ensuing conviction, asserted it as a ground of error on appeal. Appellant now argues that the defense attorney's failure to present evidence in support of the suppression motion violated his right to effective assistance of counsel.

The Florida Supreme Court affirmed the trial court's rejection of appellant's assertion of privilege. Appellant describes the court's holding as based on an absence of evidence supporting the alleged confidentiality of the conversation. He attributes this lack of evidence to his trial counsel and maintains that had the attorney put appellant or his wife on the stand or brought forth other

available evidence, confidentiality would have been shown. We reject appellant's argument for two reasons. First, in contrast to appellant's characterization, the Florida Supreme Court not only found an absence of evidence that the statements were made in confidence; it found affirmative evidence in the record indicating that they were not. See Proffitt v. State, 315 So.2d 415, 465 (Fla. 1975). Thus, even had the attorney presented contrary evidence the evidence would have been conflicting, and the likelihood that appellant would have prevailed on the privilege claim is not great. More importantly, appellant presents no convincing evidence that his attorney might have proffered to support the privilege claim. Appellant contends, for example, that he or his wife "could have testified to their actual, subjective

expectations of privacy." Such testimony would not have aided appellant, however, since Florida employs an objective standard of confidentiality. As the Florida Supreme Court stated on appellant's direct appeal, no privilege attaches to marital communications where the spouses knew or should have known that the communication was being overheard. Proffitt v. State, 315 So.2d at 464. The Florida court specifically found appellant and his wife "were speaking in a manner and place where they had a reasonable chance of being overheard, and [] knew of that possibility at that time." Id. at 465. To the extent Mrs. Proffitt's testimony at the evidentiary hearing suggested different facts, the district court found her testimony incredible. Hence, even if appellant or his wife had testified and the court had believed they were unaware that

Bassett could hear their conversation, such conversation would not have been privileged under Florida law. Nor does appellant's proffer of evidence that Bassett may have derived some of her information from conversations with appellant's wife or the police rather than by overhearing appellant convince us that his attorney failed him. The district court found the attorney had investigated fairly thoroughly how Bassett learned of the information about the killing and had eliminated the possibility that she had heard it from news reports, appellant's wife, or the police. These findings are not clearly erroneous. We therefore conclude that appellant received reasonably effective assistance at the guilt phase of his trial.

B. Ineffective Assistance of Counsel at Penalty Phase

[10-12] Appellant's claim that he was denied effective legal assistance at the penalty phase of his trial rests on arguments substantially similar to those he made to the district court. We begin our analysis by considering the standard governing our review of the district court's holding and, in turn, of the performance rendered by appellant's trial attorney. As to the former, the Fifth Circuit has held that "whether a defendant has enjoyed effective assistance of counsel is a mixed question of fact and law" as to which "the court of appeals must make an independent evaluation based on [the district court's] subsidiary findings." Washington v. Watkins, 655 F.2d 1346, 1354

(5th Cir. 1981).[28] In other words, the district court's conclusion on this question is entitled to no special deference; rather this court must review the record of counsel's "actual performance [in] conducting the defense" and determine independently whether the constitutional standard was met. Id. at 1355. Once having reviewed the record, the sixth amendment standard we must apply in assessing counsel's performance is that of

[28]Prior to the Washington decision, the Fifth Circuit precedents set forth conflicting standards for review of district courts' conclusions concerning ineffective counsel claims. The Washington panel resolved this issue by adopting the independent-evaluation standard of review and rejecting the line of cases that had treated the determination of effectiveness as a purely factual finding to which the "clearly erroneous" standard applies. The court found the cases that applied an independent-judgment standard more persuasive and better supported than those applying the clearly-erroneous test. See Washington v. Watkins, 655 F.2d at 1351-56.

"reasonably effective assistance." This standard is not to be viewed as a guarantee of "errorless counsel"; nor may counsel's performance be judged by benefit of hindsight. Id. Rather, the assistance rendered must be evaluated "from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question." Id. at 1356. We note further that the constitutional standard for effective counsel is no more stringent in capital cases than in cases where less severe punishments are imposed. Nonetheless, the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance. Id. at 1357. With this standard in mind, we now consider the alleged defects that appellant claims

rendered his trial counsel's representation inadequate.

1. Failure to Present Character Witnesses

[13] Appellant argues that his attorney should have called character witnesses to testify on his behalf at the sentencing hearing. The magistrate agreed that the attorney erred by not presenting "humanizing information [][] to counteract the dramatic impact of [Dr. Crumbley's] testimony." We do not dispute that the jury's impression of appellant, based on the evidence introduced by the prosecution at the guilt and penalty stages of his trial, was possibly unbalanced. We further agree that a cogent presentation of character evidence could have influenced the jury to recommend a life sentence.[29]

[29]See note 11 supra.

We do not agree, however, with the magistrate's conclusion that the attorney's failure to introduce such nonstatutory mitigating evidence rendered his assistance ineffective. Even accepting arguendo appellant's allegation that character witnesses willing to testify in his favor were available at the time of his trial, we cannot say that the attorney's performance, evaluated "from the perspective of counsel, taking into account the circumstances ... known to him at the time," Washington v. Watkins, 655 F.2d at 1356, was not reasonably effective.

At the time of appellant's trial in 1974, the law concerning capital sentencing was in a state of reformation. The Supreme Court's holding in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), that the sentencer in a capital case must be free to consider all relevant

mitigating evidence had not yet been decided; nor was that result clearly foreshadowed by Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)--the only contemporary death-penalty case decided by the United States Supreme Court prior to appellant's trial. Moreover, Florida's capital sentencing statute was barely a year old at the time of appellant's trial, and the only Florida Supreme Court case addressing its constitutionality supported an interpretation of the statute as limiting the mitigating evidence that could be considered to that falling within the seven statutory factors.[30] In view of these

[30]The first case considering the constitutionality of the new Florida statute was decided prior to Proffitt's trial. That case--State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974), includes a discussion of the statute's (cont'd on next page)

facts, the defense attorney's belief that

operation and the methods incorporated by the legislature for controlling sentencer discretion, see id. at 7-10, but does not decide the scope of admissible mitigating evidence. The majority and dissenting opinions in State v. Dixon, supra, reflect the two divergent interpretations of Furman prevailing at that time. The majority interpreted the rule of Furman as not abolishing discretion in capital sentencing entirely but rather as concerned with "the quality of discretion and the manner in which it [is] applied." State v. Dixon, 283 So.2d at 6. The majority read Furman as requiring that the discretion exercised in capital sentencing be "reasonable and controlled rather than capricious and discriminatory." id. at 7, but did not expressly state whether the state's mitigating circumstances provision was intended to be an exclusive list of the factors juries may consider in mitigation. The opinion's focus on the issue of control over sentencer discretion, coupled with its statement that "the propounding of aggravating and mitigating circumstances" is the "most important safeguard" the statute employs to restrain and guide such discretion, id. at 8-9, would have supported an interpretation of §921.141 as limiting sentencer consideration of both aggravating and mitigating circumstances to the factors expressly described in the statute. The dissenting opinion of Justice Ervin, which leans toward a reading of Furman as condemning all discretion in capital sentencing, see id. at 13-14 (Ervin, J.,

(cont'd on next page)

he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Fla. Stat. §921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore jusitifiable and fully within the sixth amendment standard of reasonably effective assistance.

2. Failure to Request Presentence Investigation Report

[14] Appellant claims that his trial attorney's failure to request a presentence

dissenting), and concludes that §921.141 allows more discretion than permissible under Furman, id. at 14, expressly interprets the statute as limiting the aggravating and mitigating circumstances judges and juries may consider to those enumerated in the statute. Id. at 17.

The earliest case listed in Fla. Stat. Ann. §921.141, Notes of Decisions (West 1973 & Supp. 1982) specifically discussing the mitigating circumstances provision is a 1975 case.

investigation report prior to sentencing "left the court completely in the dark concerning petitioner's individual circumstances and constituted gross ineffectiveness of counsel." As noted above, the magistrate agreed with appellant but the district court did not. We agree with the conclusion reached by the district court for two reasons. First, appellant's argument and the magistrate's recommendation are predicated largely on the assumption that a presentence investigation, had it been conducted, would have revealed favorable evidence concerning appellant's character and background[31] that

[31]Presentence reports typically contain information concerning the defendant's education, employment, and familial and medical history; the circumstances surrounding the offense; the environment to which the defendant will return after incarceration and the resources available to assist him; the defendant's prior criminal record; and the probation
(cont'd on next page)

in turn could have served as the basis for a claim of mitigating circumstances. To the extent such investigation might have provided evidence of nonstatutory mitigating circumstances, appellant's argument must fail for the same reason as his claim concerning the attorney's failure to present character witnesses; the attorney reasonably understood the law as limiting mitigating evidence to the statutory mitigating factors. Second, any claim that a presentence investigation would have revealed evidence of statutory mitigating factors, or evidence that would have rebutted the statutory aggravating factors, must also fail. Appellant has submitted no evidence demonstrating that a presentence investigation conducted at the

officer's view of his motivations. Black's Law Dictionary (5th ed. 1979). See, e.g., Fla. Stat. Ann. §921.231 (West Supp. 1982).

time of his trial would have revealed evidence substantiating any statutory mitigating factors or repudiating any of the aggravating factors asserted by the prosecution. Moreover, having reviewed the testimony of defense counsel at the evidentiary hearing and the rules and cases relied on by the district court, we concur in the court's finding that at the time of appellant's trial Florida law did not provide for presentence investigations in capital cases.[32] Under these circumstances, the attorney's failure to request such investigation cannot be viewed as falling below the level of reasonably effective assistance.

[32]See Part III.B supra.

3. Mishandling of Psychiatric Evidence

[15] Appellant discusses at length his attorney's handling of the psychiatric evidence at the sentencing phase of his trial. At the core of his argument is the fact that the attorney learned of the conversations between appellant and Dr. Crumbley by a telephone call from the doctor the night before the trial and, without requesting a continuance or further investigating this matter, relied solely on Crumbley's testimony to establish a mitigation defense at appellant's sentencing hearing. Appellant enumerates many ways in which the attorney failed him, arguing that he should have requested a continuance,[33] obtained expert psychiatric

[33]The magistrate specifically rejected appellant's contention that the attorney's failure to request a continuance after hearing from Dr. Crumbley, in order to determine whether appellant was incompetent
(cont'd on next page)

assistance,[34] and perhaps should not have

to stand trial, constituted ineffective assistance of counsel. The magistrate found that neither the facts known to the attorney prior to Crumbley's call nor the information relayed by the doctor provided him with reason to believe appellant was incompetent. The magistrate also credited the attorney's later testimony that he had "wanted the trial to begin without delay because on the morning of the trial a newspaper reporter had heard Dr. Crumbley's information and the attorney was concerned that newspaper publicity would prejudice the potential jurors. See Magistrate's Report and Recommendation 26; Transcript of Evidentiary Hearing 269-70, 301.

[34]We reject appellant's argument that his attorney should have requested expert assistance to aid him in preparing the mitigation defense. At the time of appellant's trial the law governing capital sentencing was undergoing significant change and the extent of capital defendants' procedural rights had not yet been clearly delineated. Now that cases such as Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) have set forth specific constitutional procedural requirements for death penalty cases, the Fifth Circuit cases holding psychiatric assistance and investigation essential to effective legal assistance where a psychiatric defense is raised at the guilt phase of a criminal trial, e.g., Beavers v. Balkcom, 636 F.2d. 114 (5th Cir. 1981);
(cont'd on next page)

allowed admission of Dr. Crumbley's testimony at all. While having reviewed the transcript of the evidentiary hearing and the record of appellant's sentencing proceeding we may in hindsight agree that the attorney's performance was less than stellar, we cannot conclude that it fell below the standard of reasonably effective assistance.

Davis v. Alabama, 596 F. 2d 1214 (5th Cir. 1979); vacated as moot, 446 U.S. 903,100 S.Ct. 1827, 64 L. Ed2d 256 (1980) United States v. Fessel, 531 F. 2d 1275 (5th Cir. 1976); Hintz v. Beto, 379 F. 2d 937 (5th Cir. 1967); Greer v. Beto, 379 F. 2d 923 5th Cir. 1967); see also United States v. Edwards, 488 F. 2d 1154 (5th Cir. 1974,may be applied to psychiatric mitigation defenses raised at the sentencing phase of a capital trial. No case has yet addressed this issue, however, and in 1974 it could hardly have been said that such a rule was foreshadowed. Under the circumstances,we cannot say the defendant attorney's decision to raise the psychiatric mitigating factors without first obtaining expert assistance or undertaking further investigation rendered his assistance constitutionally defective.

4. Other Ineffective Assistance Arguments

[16] Appellant details a long list of other shortcomings in his trial counsel's performance to buttress his ineffective assistance claim, including the brevity of the attorney's sentencing argument and his failure to object to various arguments and evidence presented by the prosecution. As we have noted, the constitutional right to effective legal assistance is not a guarantee of errorless counsel, Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974) (quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified, 289 F.2d 928 (5th Cir.) (en banc), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961)); nor will we assess counsel's effectiveness "through the finely ground lenses of 20/20 hindsight." Washington v.

Watkins, 655 F.2d at 1356. We therefore find appellant's contentions without merit.

C. Denial of Confrontation Rights in Using Information from Court-Appointed Psychiatrists

After the jury rendered its advisory sentence of death the trial judge, in the presence of appellant and his counsel, suggested that appellant be examined by two court-appointed psychiatrists prior to the final sentence determination. Appellant's attorney agreed to the examinations,[35] and appellant was subsequently seen by Drs. Coffer and Sprehe. Both doctors submitted reports to the court, which stated that appellant was competent at the time of the

[35]Although the attorney qualified his agreement by stating that he had not discussed the matter with appellant, appellant was present in the courtroom at the time the judge suggested the examinations, and no objection was raised to the examinations at that time or at any later date.

examination and had been capable of distinguishing right from wrong when he committed the offense. Dr. Sprehe's report additionally opined that appellant's "long standing compulsion to kill someone ... did not involve a break in reality testing and did not involve psychosis...." Dr. Sprehe described appellant as having

> a long standing sociopathic personality characterized by resort to violence as a solution to his life problems and [][] a rather chaotic life history with a lot of anti-social behavior including an Undesirable Discharge from the Armed Forces and numerous minor criminal convictions and other charges where he was not convicted. He had three rather chaotic marriages and has generally lived his life outside the usual standards of society.

Following submission of the reports the judge ordered a hearing, at which the defense attorney waived appellant's right of presence. Dr. Coffer appeared and testified that he did not believe appellant

committed the murder while under the influence of extreme emotional or mental pressure nor that appellant's capacity to conform his conduct to law was substantially impaired at the time of the offense.[36] Dr. Sprehe was unable to attend, and defense counsel requested an opportunity to cross-examine him about the report. The judge indicated he would allow Sprehe's testimony to be taken and made part of the record at a later date but proceeded to sentence petitioner without it.

Appellant raises two arguments with

[36]Dr. Coffer further testified that he believed appellant suffered from a "personality disorder" and that people with this type of disorder tended to "get [] into repeated difficulties with the law." He stated that such difficulties reflected "a lack of motivation," rather than an inability, to conform one's conduct to legal standards, however. IV Trial Record 547-49.

respect to the psychiatrists' reports and testimony. First, he claims the court's consideration of Dr. Sprehe's report without affording him an opportunity to confront and cross-examine Dr. Sprehe violated his rights to confrontation, due process, and freedom from cruel and unusual punishment. Second, appellant contends his constitutional right to be present at trial was violated by Dr. Cofer's testifying outside his presence and without his knowledge. This district court rejected these claims. The court held that appellant's rights were not violated by his not being afforded an opportunity to cross-examine Dr. Sprehe because the trial judge "did not consider [Dr. Sprehe's] report in imposing sentence." Moreover, while accepting appellant's argument that his attorney's waiver of his right to be present during Dr. Coffer's testimony was

ineffectual because not authorized by appellant personally, the court held that appellant's nonconsensual absence was harmless error.

1. Use of Dr. Sprehe's Report Without Affording Appellant Opportunity for Cross-Examination[36a]

[17] The right to cross-examine adverse witnesses is guaranteed to criminal defendants by the confrontation clause of the sixth amendment. Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); Pointer v. Texas, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). Indeed, it has been

[36a]Although appellant's attorney asserted the right to cross-examine Dr. Sprehe at the hearing, the trial court's failure to afford appellant that opportunity was not raised as error on direct appeal. The state has not contended that appellant waived this issue, however, and we therefore will not decide the claim on that ground. See Washington v. Watkins, 655 F.2d at 1368.

said that

> [t]he primary object of the [confrontation clause] was to prevent depositions or ex parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Douglas v. Alabama, 380 U.S. at 418-19, 85 S.Ct. at 1076-77 (quoting Mattox v. United States, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339-40, 39 L.Ed. 409 (1895)). Accord Davis v. Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1109-10, 39 L.Ed.2d 347 (1974). Cross-examination has been placed on a par with the right to notice and an opporutnity to be heard and the right to counsel, which are considered fundamental minimum requirements of a fair trial comporting

with the due process clause. Chambers v. Mississippi, 410 U.S. 284, 294-95, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973); Pointer v. Texas, 380 U.S. at 405, 85 S.Ct. at 1068 (both quoting In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948)). So basic is the right that the Supreme Court has held that its denial, "without waiver ... would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968); Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314 (1966).[37]

[37]The reasoning for this rule is set forth in Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931):

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it

(cont'd on next page)

[18] The rights guaranteed by the sixth amendment, including the right to cross-examination, are only applicable to proceedings that constitute critical stages

> is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. (citations omitted).

of the trial. See, e.g., United States v. Harris, 458 F.2d 670, 677-78 (5th Cir.), cert. denied, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972) (preliminary hearing); Ryan v. State of Montana, 580 F.2d 988, 992 (9th Cir. 1978), cert. denied, 440 U.S. 977, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979) (probation revocation and deferred sentencing hearing); Polizzi v. United States, 550 F.2d 1133, 1138 (9th Cir. 1976) (judge's in camera questioning of jurors re possible improper influence); United States v. Mitchell, 540 F.2d 1163, 1165 n.1 (3d Cir. 1976), cert. denied, 429 U.S. 1099, 97 S.Ct. 1119, 51 L.Ed.2d 547 (1977) (preliminary hearing). But cf. Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 1763, 36 L.Ed.2d 656 (1973) (due process guarantees right of cross-examination in probation revocation hearing); Morrissey v. Brewer, 408 U.S.

471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972) (limited right of cross-examination applies to probation revocation proceedings). Traditionally, sentencing hearings have not been accorded the significance of the guilt-determination portion of trial; by and large, sentencing has been left to the broad discretion of the judge or jury, United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972); McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), and courts have declined to apply to sentencing most of the procedural rights guaranteed by the sixth amendment. E.G., Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) (confrontation and cross-examination); United States v. Glick, 463 F.2d 491, 494 (2d Cir. 1972) (factfinding by jury). See also Hill v. United States, 368 U.S. 424,

82 S.Ct. 468, 7 L.Ed.2d 417 (1962) (right of allocution at sentencing not of constitutional dimension). But see Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) (right to assistance of counsel applies at sentencing); Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (due process guarantees hearing and confrontation in separate post-trial proceeding for indeterminate commitment of convicted sex offenders). See generally Note, The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals, 89 Harv.L.Rev. 356, 359-73 (1975). The justification for the refusal to extend the procedural limitations of the trial to the sentencing hearing was in part historical and in part rested on the belief that modern penological policies, which favor sentencing based on the maximum amount of

information about the defendant, would be thwarted by restrictive procedural and evidentiary rules. Williams v. New York, 357 U.S. at 246-50, 69 S.Ct. at 1082-84. The possibilities of delay in criminal administration and retrial of issues not relevant to the determination of guilt are additional considerations underlying the result in these cases. Id. at 250, 69 S.Ct. at 1084.

[19] Although the absence of procedural requirements designed to ensure fairness in sentencing has been widely criticized, Note, supra at 360; see, e.g., Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv.L.Rev. 904, 926-29 (1962), such has remained the constitutional rule with respect to sentencing in noncapital cases. E.g., Farrow v. United States, 580 F.2d 1339, 1353-54 n.25 (9th Cir. 1978) (en banc);

United States v. Fatico, 579 F.2d 707, 711-712 n.10 (2d Cir. 1978), appeal after remand, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980). The constitutional requirements governing capital sentencing, by contrast, have undergone substantial evolution in the wake of Furman v. Georgia. The thrust of Furman and its progeny is that the risk of arbitrary imposition of the death penalty inherent in sentencing determinations made without substantive and procedural standards conflicts with the eighth amendment prohibition on cruel and unusual punishment. Because the death penalty, unlike other punishments, is permanent and irrevocable, the procedures by which the decision to impose a capital sentence is made bring into play constitutional limitations not present in other sentencing

decisions. See Enmund v. Florida, U.S. ____, ____, 102 S.Ct. 3368, 3375-76, 73 L.Ed.2d ____ (1982); Lockett v. Ohio, 438 U.S. at 605, 98 S.Ct. at 2965; Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, 428 U.S. 280, 303-04, 305, 96 S.Ct. 2978, 2990-91, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Gregg v. Georgia, 428 U.S. 153, 181-88, 96 S.Ct. 2909, 2928-32, 49 L.Ed.2d 859 (opinion of Stewart, Powell, and Stevens, JJ.); Furman v. Georgia, 408 U.S. at 286-91, 92 S.Ct. at 2750-53 (Brennan, J. concurring); id. at 306, 92 S.Ct. at 2760 (Stewart, J. concurring); id. at 314-71, 92 S.Ct. at 2764-2793 (Marshall, J. concurring). The Supreme Court has adhered to the traditional concept of individualized sentencing, see Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57

S.Ct. at 1204 n.9. Whether the right to cross-examine adverse witnesses extends to capital sentencing proceedings has not been specifically addressed by the Supreme Court and is an issue of first impression in this Circuit. We must therefore decide this question in accord with the general principles articulated by the Supreme Court in its recent death penalty decisions.

The focus of the Court's current capital sentencing decisions has been toward minimizing the risk of arbitrary decisionmaking. See, e.g., Eddings v. Oklahoma, ____ U.S. ____, ____, 102 S.Ct. 869, 874-76, 71 L.Ed.2d 1, 8-9 (1982); id. ____ U.S. at ____, 102 S.Ct. at 878, 71 L.Ed.2d at 13 (O'Connor, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 427-28, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398; Lockett v. Ohio, 438 U.S. at 605, 98 S.Ct. at 2965; Gardner v. Florida, 430 U.S. at

358, 97 S.Ct. at 1204; Gregg v. Georgia, 428 U.S. at 188, 96 S.Ct. at 2932 (opinion of Stewart, Powell, and Stevens, JJ.); id. at 189, 96 S.Ct. at 2932 (opinion of White, J., concurring); Furman v. Georgia, 408 U.S. at 248-49 & n.11, 92 S.Ct. at 2731 & n.11 (opinion of Douglas, J.); id. at 309-20, 92 S.Ct. at 2762-67 (opinion of Stewart, J.); id. at 313, 92 S.Ct. at 2764 (opinion of White, J.). Whereas earlier cases had focused on the quantity of information before the sentencing tribunal, recently the Court has shown greater concern for the quality of such information. Gardner v. Florida, 430 U.S. at 359, 97 S.Ct. at 1205. Thus, it has recognized the defendant's interest both in presenting evidence in his favor, Eddings v. Oklahoma, ____ U.S. ____, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, supra, and in being afforded the

opportunity to explain or rebut evidence offered against him. Gardner v. Florida, 430 U.S. at 362, 97 S.Ct. at 1207. Reliability in the factfinding aspect of sentencing has been a cornerstone of these decisions. Id. at 359-60, 362, 97 S.Ct. at 1205; Woodson v. North Carolina, 428 U.S. at 305, 96 S.Ct. at 2991.

In Gardner v. Florida, supra, the Supreme Court held that a judge's reliance, in imposing the death penalty, on information not disclosed to the defendant or his attorney violated the defendant's rights to due process and freedom from cruel and unusual punishment. Gardner is premised on the principle that death sentences may not constitutionally be imposed on the basis of information that the capital defendant has been afforded no opportunity to rebut. See id. at 362, 97 S.Ct. at 1206. The holding in Gardner,

narrowly viewed, simply prohibits the use of "secret information"; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to the sentencing tribunal. In reaching its decision in Gardner, however, the Court emphasized the unacceptability of the "risk that some information accepted in confidence may be erroneous, or may be misinterpreted, by the . . . sentencing judge." Id at 359, 97 S. Ct. at 1205. Moreover, the Court expressly recognized the importance of participation by counsel and adversarial debate to eliciting the truth and "evaluating the relevance and significance

of aggravating and mitigating" evidence. Id. at 360, 97 S. Ct. at 1205. The Supreme Court's emphasis in Gardner and other capital sentencing cases on the reliability of the factfinding underlying the decision whether to impose the death penalty convinces us that the right to cross-examine adverse witnesses applies to capital sentencing hearings. The Supreme Court has recognized cross-examination as "the 'greatest legal engine ever invented for the discovery of truth.'" California v. Green, 399 U.S.149, 158, 90 S.Ct.1930,

1935, 26 L.Ed.2d 489 (1970) (quoting 5 J. Wigmore, Evidence §1367 (3d ed. 1940)).

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accomodate other legitimate interests in the criminal process. But its denial or significant diminution calls into question the ultimate "'integrity of the fact-finding process'" and requires that the competing interest be closely examined.

Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973) (citations omitted; emphasis added). Where expert witnesses are employed, cross-examination is even more crucial to ensuring accurate fact-finding. Since, as in this case (see note

36 and accompanying text supra), information submitted by an expert witness generally consists of opinions, cross-examination is necessary not only to test the witness's knowledge and competence in the field to which his testimony relates but also to elicit the facts on which he relied in forming his opinions.[38]

[20,21] Finally, we note that the decision of the former Fifth Circuit in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'd, 451 U.S. 454, 101 S.Ct. 1866,

[38] Indeed, the Florida rule governing expert testimony, much like the corresponding federal rule, eliminates the requirement that expert witnesses disclose the facts and data underlying their opinion testimony and instead places the burden on opposing counsel to elicit such information through cross examination. See Fed.R.Evid. 705; Fla.Stat.Ann. §90.705 (West 1979); Jones v. State, 289 So.2d 725, 727 (Fla. 1974). See also Brady v. State, 190 So.2d 607, 608 (Fla.App. 1966) (court-appointed expert subject to cross-examination by state and defendant).

68 L.Ed.2d 359 (1981), buttresses our conclusion that appellant had a constitutional right to cross-examine Dr. Sprehe before the doctor's report could be used in determining sentence. In Smith, we reversed a death sentence that was based in part on the testimony of a psychiatrist whose name the prosecution had intentionally omitted from its witness list. A primary basis for the decision in that case was that the prosecution's failure to disclose its intent to call the doctor prevented the defendant's counsel from conducting effective cross-examination. See id. at 699-701 & n.7.[39]

[39] The court noted that, had the defendant's attorneys been informed of the state's intent to have the psychiatrist testify at sentencing and of the nature of his testimony, they might easily have discovered information indicating the low reliability of predictions and conclusions such as those the psychiatrist made at the hearing and could have used such evidence

Although the court did not specifically address whether the defendant had a constitutional right to cross-examine the psychiatrist, it concluded that his testimony, "not effectively cross-examined by the [defense attorneys,] [] carries no assurance of reliability whatever," id. at 701, and hence that its use in sentencing the defendant violated the principles set forth in Gardner v. Florida. The reasoning in Smith clearly supports the view that the right to cross-examine adverse witnesses applies to capital sentencing proceedings,

to impeach the testimony. Smith v. Estelle, 602 F.2d at 699-700 n.7. Instead, however, "their lack of preparation made them ineffective" - they were able to "ask only broad, argumentative questions." Id. We further noted that, with advance preparation, the attorneys could have uncovered evidence of bias - such as the psychiatrist's frequent testimony for the state, his not having acted as a defense witness, and his frequent declarations that persons whom he had examined only for competency were sociopaths - which could have been used to impeach him.

at least where necessary to ensure the reliability of the witnesses' testimony.

The Supreme Court's analysis in Gardner indicates that abridgment of fundamental constitutional rights at capital sentencing may be justified in some instances where the state demonstrates a compelling interest. See Gardner v. Florida, 430 U.S. at 358-61, 97 S.Ct. at 1205-06. See also Smith v. Estelle, 602 F.2d at 701-02. Appellee suggests no cogent reason for denying appellant the opportunity to cross-examine Dr. Sprehe, however. Nor does any justification appear in the record, which indicates neither the reason for Sprehe's absence from the hearing nor why the judge chose to proceed with sentencing without his cross-examination. The most likely explanation of the judge's actions was that he wished to avoid further delay in sentencing appellant. As the Supreme Court noted in Gardner in a similar context:

> In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material. Or if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death.

Gardner v. Florida, 430 U.S. at 359-60, 97 S.Ct. at 1205.

[22-25] The district court did not address the merits of appellant's confrontation clause claim with respect to Dr. Sprehe's report because it found that "the trial court did not consider Dr. Sprehe's report in imposing sentence." We are bound by this factual finding unless it is clearly erroneous. Baty v. Balcom, 661 F.2d 391, 394 n.7 (5th Cir. 1981). The district court relied on statements by Judge Burnside, who presided at appellant's trial, to the effect that he did not use Dr. Sprehe's report in imposing sentence.

A review of the judge's testimony reveals that he qualified his statement by explaining that he did receive and read Dr. Sprehe's report and considered it for the limited purpose of ascertaining whether it supported the psychiatric mitigating circumstances.[40] After determining that the report did not support such mitigating factors, he did not consider it further. The court's reliance on this testimony is flawed in two respects. First, the district court should not have considered the trial judge's post-decision statements concerning the influence various facts had on his decision. The judge's testimony was not limited to matters of basic, historical fact but directly addressed the effect of the psychiatric evidence on his sentencing

[40] See Deposition of Judge Walter Burnside 13-14, 17, 30-32.

decision. Such post-decision statements by a judge or juror about his mental processes in reaching decision may not be used as evidence in a subsequent challenge to the decision. See Fayerweather v. Ritch, 195 U.S. 276, 25 S.Ct. 58,49 L.Ed. 193 (1904); United States v. Crouch, 566 F.2d 1311, 1316 (5th Cir. 1978). Second, even had it been competent evidence, the judge's testimony does not support a finding that he made no use of the report. We therefore hold the district court's finding that the trial court did not consider Sprehe's report was clearly erroneous, and appellant was entitled to cross-examine Dr. Sprehe.

2. Taking Dr. Coffer's Testimony in Appellant's Absence

[26-28] A defendant's right to be present at all stages of a criminal trial derives from the confrontation clause of the sixth amendment and the due process

clause of the fourteenth amendment. Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); Hopt v. Utah, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884).[41] This

[41] Because Fed.R.Crim.P. 43 requires a defendant's presence "at every stage of [a federal] trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence," the federal courts have not often been called upon to consider the extent to which that rule is constitutionally based. See, e.g., Rogers v. Unites, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Rule 43 entitles defendant to be present when trial court responds to jury's request for instruction in mid-deliberation); United States v. Alessandrello, 637 F.2d 131 (3d Cir. 1980), cert. denied, 451 U.S. 949, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981) (Rule 43 right to presence at jury impaneling is broader than constitutional right); Estes v. United States, 335 F.2d 609 (5th Cir. 1964), cert. denied, 379 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d 559 (1965) (Rule 43 violated). Early Supreme Court cases addressing the right to presence spoke in constitutional terms, see Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 253, 56 L.Ed. 500 (1912); Hopt v. Utah, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884), but one later opinion ambiguously treated the issue as one of proper procedure without

right extends to all hearings that are an

addressing constitutional concerns, Shields v. United States, 273 U.S. 583, 588-89, 47 S.Ct. 478, 479, 71 L.Ed. 787 (1927), and another suggested the constitutional right of presence was more limited in scope than prior cases had indicated, Synder v. Massachusetts, 291 U.S. 97, 107-08, 54 S.Ct. 330, 332-33, 78 L.Ed. 674 (1934) (defendant has no constitutional right to accompany jury on view of scene; due process guarantees right of presence only where defendant's absence would thwart fair and just hearing). The weight of modern authority supports a broad constitutional right of presence. See Illinois v. Allen, 377, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970) (confrontation clause guarantees accused's right to be present in courtroom at every stage of his trial); United States v. Stratton, 649 F.2d 1066, 1080 & n.20 (5th Cir. 1981) (defendant has constitutional right to presence at all stages of trial where his absence might frustrate fairness of proceedings); Badger v. Cardwell, 587 F.2d 968, 969 (9th Cir. 1978) (same); Bustamante v. Eyman, 456 F.2d 269, 272-73 (9th Cir. 1972), appeal after remand, 497 F.2d 556 (9th Cir. 1974) (Allen reaffirms broad right under confrontation and due process clauses to presence at every stage of trial); United States v. Crutcher, 405 F.2d 239, 242 (2d Cir. 1968), cert. denied, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969); Near v. Cunningham, 313 F.2d 929, 931 (4th Cir. 1963). The issue of the particular proceedings to which the right extends has continued to be litigated in recent cases in the Fifth and

essential part of the trial - i.e., to all proceedings at which the defendant's presence "has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S.

other circuits. E.g., United States v. Killian, 639 F.2d 206,209-10 (5th Cir. 1981), cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1982) (no right to presence under Rule 43 at court's granting of continuance); United States v. Dominquez, 615 F.2d 1093, 1094-95 & n.4 (5th Cir. 1980) (inadvertent excusal of juror out of defendant's presence did not violate right to presence); United States v. Willis, 583 F.2d 203, 208-09 (5th Cir. 1978) (no absolute right to presence at plea bargaining conference between court, government, and alleged coconspirator); United States v. Benavides, 549 F.2d 392, 393 (5th Cir. 1977) (right to presence extends to communication between court and deliberating jury); United States v. Provenzano, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980) (no right of presence at conference that concerned solely questions of law); United States v. Walls, 577 F.2d 690, 697-98 (9th Cir.), cert. denied, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978) (absence of defendant at in-chambers conference between juror and judge, where both counsel present, not critical).

97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Compare Hopt v. Utah, supra (defendant has right to be present at impaneling of jurors); Bartone v. United States, 375 U.S. 52, 84 S.Ct. 21, 11 L.Ed.2d 11 (1963) (court cannot impose sentence in absence of defendant); with United States v. Howell, 514 F.2d 710 (5th Cir. 1975), cert. denied, 429 U.S. 838, 97 S.Ct. 109, 50 L.Ed.2d 105 (1976) (no right to be present at in camera conference concerning attempted bribe of juror); United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (171) (right to presence does not extend to evidentiary hearing on suppression motion). We have already held that the penalty phase is an integral part of a capital trial for purposes of cross-examination. See text supra at 35-41. For similar reasons, we

conclude that the capital defendant's interest in attending his sentencing hearing is as great as his interest in being present at the guilt-determining stage. Cf. Gardner v. Florida, 430 U.S. at 358, 97 S.Ct. at 1204 (sentencing is "critical stage" of capital trial). Hence we hold that the right to be present extends to the sentencing as well as the guilt portion of a capital trial.

[29] The hearing at which Dr. Coffer testified, however, was not part of the statutory sentencing proceeding but rather was an ad hoc proceeding scheduled by the trial judge after completion of the formal sentencing hearing to allow cross-examination concerning court-ordered reports. The state argues that this "post-trial hearing" is analogous to a suppression hearing, to which the Fifth Circuit has held the defendant's right of

presence does not extend. United States v. Gradsky, supra. Accord United States v. Bell, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972). The function of the proceeding and its significance with respect to the trial, rather than the timing or sequence of events, is dispositive of the presence question, however. The psychiatric reports were evidence ordered by the court for its consideration in determining appellant's sentence. The purpose of the hearing was obvic sly to allow the attorneys to question the authors of those reports about the factual premises on which the reports were based, to probe further into the conclusions drawn by the two doctors, and otherwise to test the accuracy of the reports and their relevance to appellant's sentence. That the judge did not request the reports until after the jury had

completed its advisory sentencing does not refute their evidentiary function nor preclude the possibility that they critically affected the sentencing decision. The judge is the ultimate decisionmaker under Florida's capital sentencing scheme, and his role in sentencing is as important as that of the jury - if not more so. See Proffitt v. Florida, 428 U.S. at 251-53, 96 S.Ct. at 2966-67.[42] We therefore hold that the

[42] We do not suggest that the jury's function under Florida's capital sentencing procedures is superfluous or insignificant. On the contrary, the Florida courts accord the jury's advisory sentence great weight, Proffitt v. Florida, 428 U.S. at 249-50 & n.7, 96 S.Ct. at 2965 & n.7 (citing Tedder V. State, 322 So.2d 908, 910 (Fla. 1975); Thompson v. State, 328 So.2d 1, 5 (1976)); see note 11 supra, and the jury's recommendation may frequently be critical to the judge's decision. The judge is the ultimate decisionmaker under the Florida statute, however, and must independently weight the aggravating and mitigating evidence.. Fla.Stat.Ann. §921.141(3) (West Supp.1982). Moreover, as

hearing at which Dr. Coffer testified was a critical stage of appellant's trial at which he had a constitutional right to be present.

The state argues that even if appellant was entitled to attend the hearing, his attorney waived that right. We reject this argument for two reasons.

[30] First, our review of the relevant case law convinces us that presence at a capital trial is nonwaivable. The only precedents directly ruling on the issue are early Supreme Court cases holding that the right to presence in capital cases is so fundamental that the defendant cannot waive it. Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 253, 56 L.Ed. 500

the Supreme Court noted, "a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences simliar to those imposed in analogous cases." Proffitt v. Florida, 428 U.S. at 252, 96 S.Ct. at 2966.

(1912); Hopt v. Utah, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884). Accord Near v. Cunningham, 313 F.2d 929, 931 (3d Cir. 1963).[43] More recently, commentators have interpreted dictum in Illinois v. Allen, 397 U.S. 337, 90 S.Ct.

[43] Subsequent Supreme Court cases have rejected the even broader rule suggested by dicta in the Hopt case that the right to presence cannot be waived in any felony case. Illinois v. Allen, 397 U.S. at 342-43, 90 S.Ct. at 1060; Synder v. Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934); Frank v. Magnum, 237 U.S. 309, 340-41, 35 S.Ct. 582, 592, 59 L.Ed. 969 (1915); Diaz V. United States, 223 U.S. 442, 458-59, 32 S.Ct. 250, 255, 56 L.Ed. 500 (1912). Snyder, which was a capital case, stated that the sixth amendment privilege of confrontation could "be lost by consent or at times even by misconduct." Synder v. Massachusetts, 291 U.S. at 106, 54 S.Ct. at 332. In so stating, however, the Synder Court relied on Diaz, which expressly recognized a limitation on waiver to noncapital cases. Diaz v. United States, 223 U.S. at 455, 32 S.Ct. at 253. See also Frank v. Magnum, 237 U.S. at 341, 35 S.Ct. at 592. Moreover, in Synder there was no allegation of waiver, and thus the Court was not specifically faced with the waiver issue in that case.

1057, 25 L.Ed.2d 353 (1970) as authorizing a limited exception to the no-waiver rule for defendants who willfully disrupt their trials, 3 C. Wright, Federal Practice and Procedure §723 (Supp.1980 at 754 n.28); 8B J. Moore, Federal Practice ¶43.02[2] at 43-9 (2d ed. 1981).[44] The state does not claim that appellant disrupted or hindered any part of his trial, however; hence such exception is inapplicable to this case. Another contemporary decision - Drope v. Missouri, 420 U.S. 162, 182, 95 S.Ct. 896, 909, 43 L.Ed.2d 103 (1975) - indicates that the Supreme Court may reconsider the issue

[44] Allen was not a capital case. Apparently also in response to the Allen case, Congress in 1975 amended Fed.R.Crim.P. 43, which previously had limited waiver of presence and in-absentia trial to noncapital cases. The amended rule includes no such limitation thus leaving the issue open for clarification by the courts. See 8B J. Moore, Federal Practice §43.01[1] at 43-2, §43.01[3][a] at 43-4 (2d ed. 1981).

of waiver of presence in a capital case. Until the Court expresssly overrules its decisions in Diaz and Hopt, however, we are bound by the rule established in those cases that a capital defendant's right to presence is nonwaivable.

[31,32] Second, even were we to find sufficient support in the Allen and Drope cases for a departure from the no-waiver rule, we would at least adhere to the knowing-and-voluntary-consent requirement established in the noncapital context.[45]

[45] Several courts have addressed waiver of presence in the noncapital context and have required the defendant's knowing and voluntary consent. Bustamante v. Eyman, 456 F.2d 269, 274 (9th Cir. 1972), appeal after remand, 497 F.2d 556 (9th Cir. 1974); United States v. Crutcher, 405 F.2d 239, 243 (2d Cir. 1968), cert. denied, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969); Cross v. United States, 325 F.2d 629, 633 (D.C.Cir.1963); Evans v. United States, 284 F.2d 393, 395 (6th Cir. 1960). See also United States v. Benavides, 596 F.2d 137, 139 (5th Cir. 1979) (although right to presence in noncapital case can be waived

Appellee does not deny that appellant was neither apprised of the hearing with Dr. Coffer nor afforded an opportunity to

by accused's voluntary absence, court has "narrow discretion" in deciding whether to proceed in absentia). The Allen case supports retention of the knowing-and-voluntary waiver standard in right-to-presence cases. Allen authorized waiver where the defendant "has been warned by the judge that he will be removed if he continues his disruptive behavior [and] he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Illinois v. Allen, 397 U.S. at 343, 90 S.Ct. 1060 (emphasis added). Moreover, Allen cited Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), which established the knowing-and-voluntary-waiver standard. Similarly, the Court's conclusion in Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), that there had been insufficient inquiry to afford a basis for deciding the waiver issue was based on cases applying a knowing-and-voluntary standard for waiver. Id. at 182, 95 S.Ct. at 909 (citing Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966); United States v. Silva, 418 F.2d 328 (2d Cir. 1969)). See also Gardner v. Florida, 430 U.S. 349, 361, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) (applying knowing-and-intelligent waiver standard in similar context).

assert his right to attend; hence appellant did not knowingly or voluntarily waive his right to presence.[46]

The state's final argument with respect to the Coffer testimony is that any error in denying appellant's right to hear that testimony was harmless.[47] In the district

[46] Although the defense attorney's waiver of appellant's presence during Dr. Coffer's testimony was therefore inoperative, it is unclear whether appellant may nonetheless have waived this claim by failing to raise it on direct appeal. Since the state has not argued such post-trial procedural default on the part of appellant, we do not consider it as a basis for denying appellant's claim. Washington v. Watkins, 655 F.2d at 1368.

[47] In Rogers v. United States, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975), the Supreme Court stated that denial of the right to presence can be harmless, and the former Fifth Circuit has applied the harmless error standard to denials of the right to presence on numerous occasions. United States v. Killian, 639 F.2d 206, 210 (5th Cir. 1981), cert. denied., 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1982); United States v. Dominquez, 615 F.2d 1093, 1096 n.4 (5th Cir. 1980); United States v. Bokine, 523

court, the state presented deposition testimony of the trial judge to the effect that he ordered the doctor's reports and testimony solely to determine the existence of mitigating factors. Relying on this testimony, the district court found that appellant could have benefited from this psychiatric evidence only if it had supported a finding of mitigating factors. Even had appellant been present at the hearing and able to aid his attorney's cross-examination of Dr. Coffer, the district court reasoned, the doctor

F. 2d 767, 770 (5th Cir. 1975); United States v. Gradsky, 434 F. 2d 880 (5th Cir. 1970), cert. denied, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1971); United States v. Howard, 433 F. 2d 1, 3 (5th Cir. 1970), cert denied, 401 U.S. 918, 91 S.Ct.900, 27 L. Ed.2d 819 (1971);Estes v. United States, 335 F. 2d 609, 618-19(5th Cir. 1964); cert. denied, 379 U.S.964, 85 S.Ct. 656, 13 L. Ed. 2d 559 (1965) Rule 43, Fed. R.Crim.P., must be considered in conjunction with id. Rule 52 (a)(harmless error rule)).

would not likely have completely reversed his position to support the mitigating circumstances claimed by appellant; hence, appellant's absence did not prejudice him.

[33-35] We cannot agree with the district court's approach.[48] We note again

[48]The standard we employ in reviewing the district court's factual findings is the clearly erroneous standard. United States v. Hughes, 635 F.2d 449 (5th Cir. 1981). In reviewing questions of law and mixed questions of fact and law, however, we are free to substitute our own judgment for that of the lower court. Baty v. Balkcom, 661 F.2d 391, 394 n.7 (5th Cir. 1981); Baker v. Metcalfe, 633 F.2d 1198, 1201 (5th Cir. 1981). Although a few prior cases may be read as suggesting otherwise, see St. Jules v. Estelle, 505 F.2d 656 (5th Cir. 1974); Lawrence v. Wainwright, 445 F.2d 281, 282 (5th Cir. 1971), we believe the determination whether a constitutional error is harmless presents a mixed question of fact and law. Cf., United States v. Dixon, 593 F.2d 626, 629 (5th Cir. 1979) (decision whether error is harmless requires examination of facts, context of error, and prejudice created thereby juxtaposed against strength of evidence of guilt). See also Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (Supreme Court is not bound by state or lower courts' determination that

that the district court's consideration of the trial judge's testimony concerning his use of the psychiatrists' reports and their effect on his decision was improper. See text supra at 42. Thus, if the district court's finding that the psychiatrists' reports and testimony did not affect the trial judge's assessment of aggravating

constitutional error did not affect verdict and must make independent examination of record); Taylor v. Lombard, 606 F.2d 371, 375 (2d Cir. 1979) (court of appeals, confronted with claimed constitutional error, must review record and make its own determination of whether error occurred and, if so, whether there was reasonable likelihood it affected fairness of defendant's trial); United States ex rel Washington v. Vincent, 525 F.2d 262, 267 (2d Cir. 1975) (although state court held state's misconduct did not affect outcome of trial and district court agreed, court of appeals would make its own independent examination of record. Hence, though we will defer to the district court's subsidiary findings absent clear error, we apply our own independent judgment to the question of whether the facts shown indicate appellant's absence from the Coffer hearing was harmless beyond a reasonable doubt.

circumstances was supported solely by the latter's testimony, that finding could not stand. Review of the Coffer report and testimony in conjunction with the four aggravating factors found by the trial judge (see note 50 infra), however, provides independent support for the district court's finding. The only aggravating circumstance found by the trial judge to which Coffer's report and testimony were relevant was that the defendant "nas the propensity to commit the crime for which he was convicted." This factor was amply substantiated by appellant's own statements to Dr. Crumbley, which were related to the court at the sentencing hearing. Moreover, appellant has presented no evidence indicating that his presence at the Coffer hearing would have enabled him to rebut Coffer's testimony on that issue. Hence, whatever

influence the Coffer testimony had on the trial judge's determination of aggravating factors was minimal and, in any event, harmless. We agree with the district court that appellant's absence from the Coffer hearing was significant only insofar as it may have prevented him from assisting his attorney in developing mitigating circumstances.

[36,37] We must therefore address the district court's conclusion that the possibility appellant's absence affected the trial court's findings on mitigating factors was so insubstantial as to render his absence harmless beyond a reasonable doubt. Applied in the right-to-presence context, the harmless error rule has been stated as requiring that "[w]here there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceeding, a [judgment] cannot

stand." United States v. Stratton, 649 F.2d 1066, 1080 (5th Cir. 1981) (quoting Estes v. United States, 335 F.2d 609, 618-19 (5th Cir. 1964), cert. denied, 379 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d 559 (1965)). Thus, whether or not appellant's absence likely prejudiced him is not the standard we must apply; rather, if there is any reasonable possibility appellant's absence and inability to respond to Dr. Coffer's testimony affected the sentencing decision, we will not engage in speculation as to the probability that his presence would have made a difference. Cf. Davis v. Alaska, 415 U.S. 308, 317, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (where trial judge violated accused's right to confrontation by preventing defense from impeaching credibility of prosecution witness, Court would not speculate whether trier of fact would have accepted defense's

impeachment theory).[49] The district court

[49] The right of a criminal defendant to be present at all critical stages of his trial is a fundamental constitutional right. See Dutton v. Evans, 400 U.S. 74, 79, 91 S. Ct. 210, 214, 27 L. Ed. 2d 213 (1970) (confrontation of adverse witnesses is a fundamental right); Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970) (right to be present is "[o]ne of the most basic rights guaranteed by the Confrontation Clause . . .") It is clear that once the defendant has established a violation of that right his conviction is unconstitutionally tainted and reversal is required unless the State proves the error was harmless beyond a reasonable doubt. See United States v. Stratton, 649 F. 2d 1066, 1080 (5th Cir. 1981) citing Rogers v. United States, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975); cf. Wright v. Estelle, 571 F. 2d 1071, 1081 (5th Cir. 1978) (en banc) (Godbold, J., dissenting) (violation of fundamental rights necessitates automatic reversal, even in face of arguably harmless error). We see nothing in the Supreme Court's recent decision in United States v. Valenzuela-Bernal, --U.S. --, 102 S.Ct. 3440, 73 L.Ed.2d - (1982), that alters this mode of analysis in cases involving the defendant's right to be present at the critical stages of his trial. In Valenzuela Bernal, the Court held that because the sixth amendment only guarantees a criminal defendant "compulsory process for obtaining witnesses in his favor," the defendant must make a plausible

concluded appellant's absence was harmless because appellant did not demonstrate that, had he been present and able to assist his attorney at the hearing, he would have been to effectuate a "complete reversal" of Coffer's opinion concerning the psychiatric mitigating factors. The court found no evidence that such would have been the

showing that the witnesses whose testimony he seeks to compel would offer favorable testimony. Id. at _____, 102 S. Ct. at 3446 (emphasis in original). This decision may, but need not be read as requiring that a defendant demonstrate prejudice as a prerequisite to obtaining relief under the compulsory process clause. Because Valenzuela-Bernal concerns a criminal defendant's rights under the compulsory process clause, its arguable prejudice requirement does not govern this case, in which a different constitutional provision-the confrontation clause-is at issue. Even if we assume that the holding in Valenzuela-Bernal is as broad as to incorporate a prejudice requirement in confrontation clause cases, our result would be no different. In our view, the same evidence proffered by Proffitt to rebut the State's claim of harmless error conclusively establishes that the denial of right to be present at the post-trial hearing seriously prejudiced him.

case. Having reviewed the record, we simply cannot agree. Appellant has shown that during the period when he was examined by Drs. Coffer and Sprehe he was receiving anti-psychotic medication and that neither his attorney nor the doctors were aware of that fact. Dr. Coffer's evaluation of appellant's mental state at the time of the offense was based in part on his observation that, at the time of the examination, appellant exhibited no psychotic tendencies. The doctor's opinion might have differed had he known appellant was under medication. Appellant has presented additional information, such as repeated suicide attempts, of which his attorney and the doctors were not informed at the time of the sentencing hearing. It is possible that none of these facts would have changed Dr. Coffer's opinion; however,

we cannot with confidence eliminate the very reasonable possibility that they would have had such effect. We therefore conclude that the trial court's violation of appellant's right to presence was not harmless beyond a reasonable doubt.

D. Unconstitutional Consideration and Application of Aggravating Circumstances

In support of his decision imposing the death penalty the trial judge listed four aggravating factors.[50] Appellant contends

[50] The judge found

AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, CHARLES WILLIAM PROFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.

(C) That the murder of JOEL RONNIE MEDGEBOW by the Defendant, CHARLES

that three of these factors were invalid and therefore that imposition of the death penalty in this case violated his eighth amendment right to be free from cruel and unusual punishment.

WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons.

1. Unsupported Aggravating Circumstances

[38] Appellant contends that two of the aggravating factors relied on by the judge--that the murder was especially heinous, atrocious, and cruel, and that appellant created a great risk of serious bodily harm and death to many persons--were unsupported by any evidence in this case. Appellant does not contend that it is the federal courts' function in habeas cases generally to review the state courts'

findings for evidentiary sufficiency.[51] Appellant relies on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), however, in urging that it is properly within the province of this court to review a claim that a state court's construction of an aggravating factor provision in a particular case is so vague

[51] Under Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), it is clear that federal courts' responsibilities in reviewing habeas challenges to state court convictions encompass a limited evidentiary review aspect--namely, the determination "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 313-18, 99S.Ct. at 2785-88. We need not address whether a similar evidentiary review function must be exercised with respect to the facts underlying capital sentencing decisions, however, cf. Spinkellink v. Wainwright, 578 F.2d 582, 606 n.28 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed. 796 (1979) (evidentiary review proper where application of §921.141 in particular case is "patently unjust and [] shock[s] the conscience"), since appellant's claim is cognizable as a vagueness challenge to the statute as applied, see text infra.

or broad as to violate Furman's requirement that sentencing decisions be guided by clear, objective, rationally reviewable standards. On the basis of Godfrey, we conclude that the claim appellant presents is cognizable by this court.[52]

[52] The state argues that the former Fifth Circuit decision in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) precludes us from reviewing the Florida court's application of specific aggravating factors to the facts of this case. In Spinkellink, the court interpreted the Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) as holding that the aggravating and mitigating provisions of the Florida death-penalty statute "conclusively remove[] the arbitrariness which Furman held violative of the Eighth and Fourteenth Amendments." See Spinkellink v. Wainwright, 578 F.2d at 604-06. The court therefore declined to review an attack on the statute as applied absent facts and circumstances "so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience." Id. at 605-06 & n.28.

Two years after the former Fifth Circuit decided Spinkellink, the Supreme Court addressed an attack on a state

In Godfrey, the Court considered the court's application of an aggravating factor under its capital sentencing statutes. See Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed 2d 398 (1980). Four justices joint in the plurality opinion, which accorded full review to this contention. Id. at 442,100 S. Ct. at 1762. Two justices concurred in the judgment both on the ground that the death penalty is under all circumstances unconstitutional and in agreement with the plurality's conclusion concerning the application of the statute. See id. at 433-42, 100 S. Ct. at 1767-72. (Brennan, J. and Marshall, J., concurring). In view of Godfrey, we can only conclude that the language in the Spinkellink opinion precluding federal courts from reviewing state courts' applicaiton of capital sentencing criteria is no longer sound precedent.

In Williams v. Maggio, 679 F. 2d 381, 386-90 (5th Cir. 1982), the former Fifth Circuit refused to consider a challenge to two statutory aggravating factors on grounds similar to those asserted here because the state appellate court had affirmed the sentence on the basis of a third valid aggravating factor. The court interpreted Godfrey as justifying reversal of a death sentence only where the sentence is based solely on the unsupported aggravating factor. Id. at 390. Williams, which was decided by Unit A of the former Fifth Circuit after October 1, 1981, is not controlling precedent in the Eleventh Circuit. Stein v. Reynolds Securities, Inc.,667 F.2d 33,34 (11th Cir. 1982 as

constitutionality of a death sentence imposed under the Georgia capital sentencing statute on the basis of the aggravating factor that the murder "was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id. at 426, 100 S.Ct. at 1764. The defendant had been convicted of killing his wife and his mother-in-law by shooting each in the head with a shotgun. Notwithstanding the Court's prior decision holding the the same aggravating factor was not unconstitutionally vague, Gregg v.

corrected June 28, 1982). Moreover, Williams is distinguishable because in that case the petitioner challenged only allegedly unsupported aggravating factors, whereas appellant here asserts that this sentence was based on unsupported and nonstatutory factors. See section IV.D.2 infra. We need not decide whether appellant's claims of unsupported aggravating factors alone would merit reversal of his sentence.

Georgia, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976),[53] a plurality in Godfrey held that the jury's and state supreme court's application of the "vile, horrible and inhuman" aggravating factor absent any evidence of torture or aggravated battery to the victims was an "unconstitutional construction" of that provision. Although the Georgia courts previously had accorded a limiting construction to the aggravating factor at issue, the plurality found that such

[53] In Gregg, the Court had rejected a challenge to the same aggravating circumstance on the ground "that it is so broad that capital punishment could be imposed in any murder case," noting that "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." Gregg v. Georgia, 428 U.S. at 201, 96 S.Ct. at 2938.

construction had not been followed in Godfrey's case.[54] The plurality concluded that, "in light of the facts and

[54] The plurality noted that "[t]here is nothing in these few words ["outrageously or wantonly vile, horrible and inhuman"], standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence," since "[a] person of ordinary sensibility could fairly characterize almost every murder" as meeting that definition. Because the judge had given the jury no instruction regarding the meaning of those terms, the plurality concluded that the jury's sentencing discretion was basically uncontrolled. Godfrey v. Georgia, 446 U.S. at 428-29, 100 S.Ct. at 1764-65. Moreover, the record evinced no evidence nor had the prosecution claimed that the defendant "committed an aggravated battery upon his wife or mother-in-law, or in fact, caused either of them to suffer any physical injury preceding their deaths." Id. at 432, 100 S.Ct. at 1767. Finally, the Georgia Supreme Court's affirmance of the defendant's sentence did not, in the plurality's view, cure the broad construction that the jury apparently had accorded the aggravatng factor, since that court had not disagreed with the trial judge's statement that the murders had not involved any torture. Id.

circumstances of the murders that Godfrey was convicted of committing," his crimes could not "be said to have reflected a consciousness materially more depraved than that of any person guilty of murder." Godfrey v. Georgia, 446 U. S. at 432, 433, 100 S. Ct. at 1767. Since there was "no principled way to distinguish [that] case, in which the death penalty was imposed, from the many cases in which it was not," id. at 433, 100 S. Ct. at 1767. Since the Georgia courts had failed to comply with Furnan's requirement that any decision to impose the death sentence be based on clear, detailed, and objective standards reflecting "reason rather than caprice or emotion." Id.

[39] The aggravating factors challenged by appellant here were upheld by the Supreme Court as facially valid on appellant's direct appeal. Proffitt v. Florida, 428 U. S. at 255-56, 96 S. Ct. at 2968. The Court did not rule on the constitutionality of the provision as applied in this case,[55] however; hence

[55] See Proffitt v. Florida, 428 U.S. 242, 254 N.11, 96 S. Ct. 2960, 2967 n. 11, 49 L. Ed. 2d 913 (1976). Appellant attacked these aggravating factor provisions as impermissibly vague and broad. The challenge was directed toward, and was treated by the plurality as one questioning, the facial constitutionality of the statutory aggravating factors "as they have been construed by the Supreme Court of Florida of Florida." Proffitt v. Florida, 428 at 255-56 96 S. Ct. at 2968. In support of challenge to the statute, appellant cited the application of the aggravating factor provisions to his own case as demonstrative of the broad interpretation accorded them by the Florida Supreme Court. With respect to the "great risk of death to many persons" factor, the plurality found that the Flroida court had not relied on such factor in affirming appellant's sentence; the Court thus did not consider appellant's case as having any bearing on the construction of that

the issue properly before this court. Before addressing the merits of appellant's claim, we deem it advisable to state the precise nature of the issue before us. The question is not whether we agree with the sentencing court that appellant should receive the death penalty. See note 51

provision. See Proffitt v. Florida, 428 U.S. at 256 n. 13, 96 S. Ct. at 2968 n.13. The plurality, in concluding that the Florida court had consistently applied its limited construction of the "heinous, atrocious, and cruel" circumstance, did not specifically state whether the application of that provision to appellant's crime comported with the Florida court's constitutionally tailored definition of the eighth statutory factor.

supra. Nor is it within our province to judge the merits of the particular aggravating factors chosen by the Florida Legislature and interpreted by the Florida courts as justifying the imposition of death. Rather, the issue we must decide is essentially a procedural one: whether the construction of the eighth statutory aggravating factor evinced by the trial court's application of it to the facts of this case comports with the eighth amendment requirement that death sentences be based on clear, detailed, and rationally reviewable standards. See Godfrey v. Georgia, 446 U.S. at 427-33, 100 S.Ct. at 1764-67.

[40] As the Supreme Court noted on Proffitt's direct appeal, the Florida court has accorded a limited interpretation to the "heinous, atrocious, and cruel" aggravating factor. Proffitt v. Florida,

428 U.S. at 255-56,96 S.Ct. at 2968. The state court has required that the "horror of the murder be accompanied by such additional acts as to set the crime apart from the norm." Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). More specifically, the court has held that the murder must be "conscienceless or pitiless" in the sense that it is "unnecessarily torturous to the victim." Id. The numerous cases in which the Florida Supreme Court has considered challenges to the application of this aggravating factor support the interpretation requiring acts of physical harm or torture to the murder victim prior to or accompanying the act resulting in death. Compare, e.g., Welty v. State, 402 So.2d 1159 (Fla. 1981) (factor upheld where

defendant robbed victim, later returned to victim's residence, struck sleeping victim several times in neck, and then set fire to his bed); Straight v. State, 397 So.2d 903 (Fla.), cert. denied, ___ U.S. ___, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981) (factor upheld where defendant participated in murder inflicted by multiple stab wounds and bludgeoning); Thompson v. State, 389 So.2d 197 (Fla. 1980) (factor upheld where victim died of wounds from gruesome series of torturous acts by defendant); Lucas v. State, 376 So.2d 1149 (Fla. 1979) (factor upheld where defendant shot victim, pursued her into house, struggled with her, hit her, dragged her from house, and shot her to death while she begged for her life); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980) (factor upheld where defendant tortured his child

over prolonged period and murdered her to prevent discovery of her battered condition); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979) (factor upheld where evidence showed bullet did not penetrate victim's skull and cause of death was four of nine stab wounds, none of which was instantly fatal) with Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, ___ U.S. ___, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981) (factor reversed where victim died quickly from single gunshot blast fired through window and victim was unaware he was going to be shot); Armstrong v. State, 399 So.2d 953 (Fla. 1981) (factor reversed where murderers were only at scene of crime for very brief period and shooting was precipitated by armed resistance); Williams v. State, 386 So.2d 538 (Fla. 1980) (factor reversed where victim died

almost instantaneously from gunshot wounds); Fleming v. State, 374 So.2d 954 (Fla. 1979) (factor reversed where killing of policeman accomplished by single shot fired when hostage grabbed defendant's gun); Kampff v. State, 371 So.2d 1007 (Fla. 1979) (factor reversed where defendant directed pistol shot straight to head of victim); Halliwell v. State, 323 So.2d 557 (Fla. 1975) (factor reversed where mutilation of victim's body occurred only after victim's death.. The Florida court has repeatedly rejected application of this factor to killings accomplished quickly by acts of shooting or stabbing involving no additional torturous acts to the victim. E.g., Lewis v. State, 398 So.2d 432 (Fla. 1981); Demps v. State, 395 So.2d 501 (Fla.), cert. denied, ___ U.S. ___, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Kampff v. State, supra; Menedez v. State, 368 So.2d

1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978). Moreover, the court has expressly held that the fact that a murder is "premeditated, cold and calculated" does not render it especially heinous, atrocious and cruel. Lewis v. State, 398 So.2d at 438.

Nor does the commission of the killing in the presence of another family member bring it within the statutory factor, since, under the Florida court's construction of the factor, the atrocity must consist of any act done to the victim. Riley v. State, 366 So.2d at 21.

[41] In this case, there was no evidence that appellant perpetrated any physical act on the victim other than the single stab in the chest that resulted in his death.[56] Moreover, neither in his

[56] The trial judge's findings state only

findings nor in his instructions to the jury as to the meaning of the eighth aggravating circumstance did the trial judge indicate that such factor requires proof of torturous acts to the victim.[57]

that the eighth statutory factor was established and not the particular facts on which such conclusion was based. Since the physician who conducted the autopsy of the victim testified that he discovered no injuries to the victim's body other than the stab wound that pierced his chest and heart, II Trial Record 229, there were no facts supporting the trial court's application of factor eight under the limiting construction adopted by the state supreme court. Nor was the higher court's construction of that provision unavailable to the trial court at the time of appellant's sentencing. State v. Dixon, 283 So.2d 1 (Fla. 1973), the seminal decision interpreting the new Florida death penalty statute and considering its constitutionality, was decided nearly one year before appellant's trial. That case stated that "[w]hat is intended to be included [in the eighth statutory aggravating circumstance] are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 9 (emphasis added).

The finding made by the judge in this case

57 The relevant portion of the judge's sentencing instructions provides:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: . . .
>
> Eighth, that the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> You are instructed that "heinous" means extremely wicked or shockingly evil; and that "atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

IV Trial Record 531. This language, which is derived from State v. Dixon, supra, provides little more guidance than the statute's original terms to aid the jury in determining when this factor should be applied as a basis for imposing the death penalty. The modifiers in the instruction -- "extremely", "outrageously", and "shockingly" like the term "especially" employed in the statute, signal that the crime should be in some respect worse than average. The difficulty with the various adjectives used in either the statute (heinous, atrocious, and cruel) or the

therefore suggests no "inherent restraint on the arbitrary and capricious infliction of the death sentence." Cf. Godfrey v. Georgia, 446 U.S. at 428, 100 S.Ct. at 1764 (instructions alone did not restrain jury's discretion). Finally, the Florida Supreme Court's decision affirming appellant's sentence does not indicate it even considered the propriety of the application

instruction (wicked, evil, vile) is that they fail to indicate in what way the crime should be "worse". While they indicate some sense of dimension or degree, they fail to state what is being measured. As the Supreme Court has noted, "[a] person of ordinary sensibility could characterize almost every murder" within such terms, Godfrey v. Georgia, 446 U.S. at 428-29, 100 S.Ct. at 1764-65, and the jury in this case could well have subscribed to such a view. Finally, although the definition of cruel provided by the trial judge is more specific than the rest of the instruction and hints of "additional [torturous] acts" requirement set forth in Dixon, the instruction fell short of imposing such limitation since the cruelness feature of the aggravating factor is an alternative one. Hence, the jury's sentencing discretion was not significantly limited by this part of the instruction.

of such factor in this case, see Proffitt v. State, 315 So.2d at 466-67, and thus that court's review "in no way cured" the exercise of "uncontrolled discretion" by the judge in this case. Godfrey v. Georgia, 446 U.S. at 429, 100 S.Ct. at 1765.

[42] Applying the same analysis to the trial court's finding that "[t]he defendant knowingly . . . created a great risk of . . . death to many persons," we conclude that application of that provision in the instant case implies a construction so broad that it cannot be viewed as a meaningful limitation on sentencer discretion. Appellant's act of killing, consisting of the infliction of a single knife wound in the chest of the victim, endangered only the victim himself. Although the facts indicate that that appellant struck the victim's wife with his

fists when she was awakened by her husband's moans, there was no evidence that the blows were of such force that they were likely to kill her.[58] Even if appellant

[58] The trial court's findings stated this aggravating factor in terms that were arguably broader than the statutory terms; it found appellant had "created a great risk of serious bodily harm and death to many persons," whereas the statutory factor encompasses only "great risk of death." Compare Fla. Stat. §921.141(5)(c) (reprinted in note 8 supra) with note 50 supra. Because the statute does not include as aggravating a risk of bodily harm other than death, appellant contends the judge's finding represents a nonstatutory aggravating factor. The discrepancy between the judge's findings and the statute does not on its face appear significant, because the language used by the judge suggests his finding included both a risk of death and a risk of bodily harm to many persons. On the other hand, the facts surrounding appellant's offense, which do not support risk of death may be viewed as an indication that the court included the reference to serious bodily harm precisely because it though the evidence in this case did not support the "great risk of death" factor. In any event, we need not decide whether the trial court's finding, as stated, represents consideration of a nonstatutory aggravating factor since we have already concluded that

could reasonably be said to have threatened the woman's life, the sum of appellant's acts surrounding the killing, viewed in the light least favorable to him, at most could be said to have risked death to two persons. Application of this aggravating factor to the facts of this case is not only inconsistent with the Florida Supreme Court's construction of the provision;[59] it

the application of §921.141(5)(c) to this case renders the provision unconstitutionally vague and invalidates its use as a factor supporting appellant's sentence. See section IV.D.1 supra.

[59] In Kampff v. State, 371 So.2d 1007 (Fla. 1979), the Florida Supreme Court reversed a trial court finding that the defendant, who had killed his victim by firing five shots at her at a retail store in the presence of two other persons, had created a great risk of harm to many persons within the meaning of the aggravating circumstance provision. The court stated:

> When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some

also reflects an absence of control or

> degree of risk of bodily harm to a few persons. "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many," the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.

Id. at 1009-10. Accord Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) (shooting of victim in total disregard for safety of two others present insufficient); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981) (shooting of two persons, though near major highway, not sufficient where done with pistols at close range); Johnson v. State, 393 So.2d 1069, 1073 (Fla. 1980), cert. denied, ___ U.S. ___, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981) (three others present besides victim at time of shootout not "many persons" within statutory aggravating factor); Williams v. State, 386 So.2d 538 (Fla. 1980) (great risk of death to one other besides victim insufficient to trigger third aggravating circumstance); Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981) (risk of death to victim only not sufficient though murder committed in public place); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979) (presence of victim's two children in possible path of defendant's bullets not sufficient to

guidance of the sentencing judge's discretion. We cannot say that the death sentence imposed on the basis of such factor was "based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393.

2. Nonstatutory Aggravating Factors

In addition to the two aggravating factors discussed above, appellant

establish risk to "many persons"). See also Mines v. State, 390 So.2d 332, 337 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981) (only conduct of defendant directly surrounding capital offense may be considered in applying third aggravating factor; defendant's acts after murder of flagging down motorist, striking him with machete, driving to real estate office at high rate of speed, taking woman hostage, and threatening her life could not be considered). Compare above cases with King v. State, 390 So.2d 315, 320 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981) (factor upheld as applied to defendant's acts of arson, which foreseeably risked death to occupant of dwelling, neighbors, firefighters and police.)

challenges a third factor relied on by the judge because it does not accord with circumstances identified as aggravating in Fla. Stat. §921.141(5). The judge's finding that appellant "has the propensity to commit the crime for which he was convicted . . . and is a danger and a menance to society," on which he relied as one aggravating factor supporting the death penalty, bears no resemblance to any of the statutory aggravating factors.

[43,44] In Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated on other grounds, ___ U.S. ___, 102 S.Ct. 2922, 73 L.Ed.2d ___ (1982), the Fifth Circuit held that consideration by the sentencer of nonstatutory aggravating factors violates the eighth and fourteenth amendments. Although the Henry decision has been vacated by the Supreme Court on procedural grounds not relevant to this case,[60] we

find its reasoning persuasive and therefore

60 In Henry, the petitioner had failed to object at trial to the jury instructions that were the subject of his habeas challenge. Henry v. Wainwright, 661 F.2d at 57. The state argued that by violating Florida's contemporaneous objection rule Henry had waived his claim of error in the instructions under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The Henry court rejected this argument, however, on the ground that an objection would have been futile.

The Supreme Court vacated the former Fifth Circuit decision in Henry for reconsideration in light of Engle v. Isaac, ___ U.S. ___,102 S Ct. 1558, 71 L.Ed.2d 783 (1982). Wainwright v. Henry, ___ U.S. ___, 102 S.Ct. 2922, 73 L.Ed.2d ___ (1982). In Engle, the Supreme Court held that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." Id. at ___, 102 S.Ct. at 1572, 71 L.Ed.2d at 802. The Supreme Court's decision to vacate Henry presumably was based on the Henry court's articulation of a standard for cause that may conflict with that adopted in Engle.

The waiver issue involved in Henry is not present with respect to Proffitt's aggravating circumstances claims. Appellant's constitutional challenges are aimed not at the jury instructions, but rather at the trail judge's findings on aggravating circumstances. Obviously no objection to the findings could have been raised at trial because the judge did not

adopt its analysis. See Zant v. Stephens, ___ U.S. ___, ___, 102 S.Ct. 1856, 1859-65, 72 L.Ed.2d 222 (Marshall, J., dissenting); id. 102 S.Ct. at 1865 (Powell, J., dissenting).

In Henry, the court held that admission of evidence of aggravating factors not listed in the statute coupled with an instruction allowing the jury to consider nonstatutory aggravating factors in

make the findings until after the trial. On his direct appeal to the Florida Supreme Court, appellant objected to the findings concerning at least two of the aggravating circumstances and asserted generally that the judge had exercised unfetered discretion in imposing the death sentence. See V Trial Record 561; VII Trial Record 615. In any event, the state has not argued that appellant waived his objections to the aggravating circumstances findings; hence, the state has waived any waiver argument it might have asserted. Cf. Hopkins v. Jarvis, 648 F.2d 981, 983 n.2 (5th Cir. 1981) (state's failure to raise lack of exhaustion constitutes waiver of exhaustion requirement); Messelt v. Alabama, 595 F.2d 247, 250-51 (5th Cir. 1979) (same).

rendering any advisory sentence was unconstitutional. Unlike Henry, appellant does not complain that the jury was allowed to consider evidence of nonstatutory aggravating circumstances or that the jury's advisory sentence was based on such evidence;[61] rather, he challenges the trial

[61] The transcript of appellant's sentencing hearing indicates that the attorney for the state introduced evidence of, and directed part of his argument to establishing, nonstatutory aggravating factors. He asked the jury to consider various factors, which he did not attempt to place within the statutory categories, such as the "senselessness" of the killing; the relative youth of the victim, the fact that he was well-liked, and the impact of the killing on his family; the dangerousness of the defendant and failure of the criminal justice system to rehabilitate him after his prior conviction; the frightening nature of the crime and the "preciousness" of people's right to be secure in their own homes; and the defendant's flight after the crime and five-month absence from the jurisdiction prior to extradition. Appellant does not challenge the court's admission of such evidence and argument-presumably because his attorney's failure to object at the time waived his right to assert such a

court's sentencing decision, which its findings indicate was based partly on nonstatutory aggravating factors. In our view, the reasoning employed by the Henry court, with which we agree, is equally applicable to the advisory sentence decision of the jury and the ultimate sentence determination made by the trial judge.[62] As the Henry court noted, Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) held unconstitutional under the eighth amendment capital

challenge.

[62] Indeed, in view of the special responsibility of the judge to ensure consistency in capital sentencing decisions by applying the statute "in the light of judicial experience," State v. Dixon, 283 So.2d 1, 8 (Fla. 1973); Proffitt v. Florida, 428 U.S. at 252, 96 S.Ct. at 2966, the judge's improper consideration of nonstatutory aggravating factors in this case may be a more egregious violation of Furman than the jury's consideration of such evidence in Henry. See note 42 supra and accompanying text.

sentencing procedures that, by failing to limit and guide sentencer discretion, permitted arbitrary and selective imposition of the death penalty. Henry v. Wainwright, 661 F.2d at 58. In Furman's 1976 progeny, in which five post-Furman capital sentencing statutes were challenged, the Court upheld those statutes that provided specific and detailed standards to guide the sentencer in deciding whether to impose the death penalty. See Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The Court specifically approved the Florida statute because its aggravating and mitigating provisions appeared to provide such guidance. Proffitt v. Florida, 428 U.S. at 248-53, 96

S.Ct. at 2964-2967. In considering appellant's "propensity to commit [murder]" and the danger he posed to society, the trial court transcended the list of aggravating factors set forth in the Florida statute and substituted his own judgment of what circumstances justify capital punishment for that of the Florida Legislature. In so doing, the trial judge not only committed error under the state law, see Brown v. State, 381 So.2d 690, 696 (Fla. 1980); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); he also exceeded the federal constitutional limitations imposed by Furman on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner. In short, we agree with the Henry court that because "the limitations of the statute make the death penalty constitutional . . . [i]gnoring

those limitations [] implicates the constitution." Henry v. Wainwright, 661 F.2d at 60. For the reasons just stated, we conclude that the trial judge's reliance on nonstatutory aggravating circumstances renders appellant's sentence unconstitutional under the eighth and fourteenth amendments.

[45-47] As a fallback argument, the state contends that even if the trial judge erroneously considered nonstatutory aggravating factors such error was harmless because in this case the judge found no mitigating circumstances. As long as some of the aggravating factors found by the sentencer are valid, the state argues, death is "presumed proper" in the absence of mitigating evidence. We cannot agree with this argument for several reasons. First, one premise of the state's argument-that there were several valid aggravating

factors supporting the sentence-cannot be established in this case. Eliminating the nonstatutory factor, we are left with three statutory aggravating circumstances found by the trial judge: that appellant committed the murder while in the course of committing the additional felony offense of burglary, that he created a great risk of death to many persons, and that the murder he committed was especially heinous, atrocious, and cruel. See note 50 supra. Although these factors fall within the statutory list, we have determined that the trial court's application of the "heinous, atrocious and cruel" and "great risk of death to many persons" factors in this case was unconstitutional under Godfrey. See section IV.D.1 supra. Hence, the only valid aggravating factor in this case is that appellant committed the murder in conjunction with a burglary. In some cases

one statutory aggravating circumstance may be sufficient justification for imposing the death penalty. We cannot concluded, however, that appellant's entry of the victim's house, which he did for the purpose of committing the murder, was a circumstance "sufficient[ly] aggravating" in nature that the judge necessarily would have imposed the death penalty on that ground alone. See Fla.Stat.Ann. §921.141(3) (West Supp. 1982) (judge must find "sufficient aggravating circumstances" exist to justify sentence of death). The second premise of the state's argument - that there were no mitigating circumstances that might outweigh any aggravating ones- presents similar difficulties. The trial court's findings do not unqualifiedly state that there are no mitigating circumstances but rather indicate the judge's conclusion that such factors "are primarily negated"

and are "outweigh[ed]" by the aggravating factors he found.[63] Thus, contrary to the state's characterization, this case does not present the situation in which there exist valid aggravating factors undoubtedly sufficient to justify a death sentence counterbalanced by no mitigating factors.

An even more substantial impediment to adopting the analysis suggested by the state is that the Fifth Circuit has already rejected it. In Henry, in addition to the nonstatutory aggravating factors, the trial court had found several statutory

[63] Appellant's claim that the trial court's instructions precluded the jury from considering mitigating evidence he proffered that did not fall within the statutory mitigating circumstances, if accepted, would further undermine the state's characterization of this case as involving no mitigating factors. As noted in section IV.E infra, however, we do not decide appellant's mitigating circumstances claim because such decision is unnecessary to our resolution of this case.

aggravating factors and no mitigating ones. Although the Florida Supreme Court affirmed the sentence on this ground, the former Fifth Circuit disagreed and held that affirming a death sentence partially predicated on nonstatutory factors violates the eighthamendment requirement of rational appellate review of capital sentencing decisions. Henry v. Wainwright, 661 F.2d at 58-60. The Florida Supreme Court's attempt "to divine what motives impelled [this] death penalt[y]," in the Henry court's view, had compounded rather than resolved the trial court's sentencing error. Id. at 59. Recognizing the importance of the appellate review aspect of Florida's capital sentencing scheme, which the Supreme Court emphasized in upholding the Florida statute,[64] the Henry

[64] Proffitt v. Florida, 428 U.S. at 250-

court declared:

> Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.

Id. We agree that the rational appellate review of capital sentencing decisions contemplated by Furman and its progeny requires more than mere speculation or

51, 253, 258-59, 96 S.Ct. at 2969. See also Henry v. Wainwright, 661 F.2d at 60 n.8 ("Such a guessing game is the antithesis of the rational review of the jury's application of clear and objective standards contemplated by Furman and its progeny."); Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980), reh. denied and modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, --- U.S. ---, 102 S.Ct. 90, 70 L.Ed.2d 222 (1982) (vacating death sentence based partly on unconstitutionally vague aggravating factor because it is "impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance").

conjecture as to what the sentencing tribunal would have decided had it correctly applied the law. Such post hoc justification of a sentencing decision, which depends on a rationale for imposing death distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities. Cf. Presnell v. Georgia, 439 U.S. 14,99 S. Ct. 235, 58 L. Ed. 2d 207 (1978)(per curiam) (imposition of death penalty where appellate court rejected jury grounds for sentence but affirmed on different theory violated due process). Only where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result should a sentence be affirmed despite constitutional error. Such was not the case here. We conclude that the trial court's unconstitutional

application of statutory aggravating factors and consideration of nonstatutory ones entitled appellant to resentencing in the trial court.

E. Unconstitutional Limitation of Mitigating Circumstances

Appellant contends the trial court's instructions to the jury on aggravating and mitigating factors violated his right under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) to have the sentencers consider nonstatutory mitigating evidence concerning his character and the circumstances of his offense. The state asserts that appellant's failure to object to the jury instructions resulted in a waiver of such objection under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) and that in any event there was no Lockett violation in this case. Both the substantive Lockett issue

and the waiver issue are currently before this court for en banc consideration in a case involving facts substantially similar to those presented by this case. See Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982), rehearing granted (Apr. 28, 1982). Resolution of Proffitt's mitigating circumstances claim without benefit of the en banc court's decision in Ford would be premature. Because of our disposition of the other issues raised by appellant entitles him to resentencing in the Florida courts, decision of the mitigating circumstances claim is unnecessary.

V. Conclusion

We find appellant's procedural challenge to be without merit; the district court's decision not to conduct a second evidentiary hearing on appellant's ineffective assistant claims was a proper exercise of the court's discretion. On the

merits, we affirm the decision of the district court insofar as it rejected appellant's claims of ineffective legal assistance at both the guilt and sentencing phases of trial. We disagree with the court's disposition of the confrontation and aggravating circumstances claims, however. Because the state court's use of psychiatric evidence that appellant had no opportunity to rebut and its consideration of nonstatutory aggravating factors violated appellant's sixth, eighth, and fourteenth amendment rights, the decision of the district court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Judge CLARK reserves the right to file a concurring or dissenting opinion.

September 17, 1982

No. 80-5997- CHARLES WILLIAM PROFFITT v. LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation

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CLARK, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion except the holding that the defendant had effective assistance of counsel at the sentencing phase of his trial. I also disagree with the subsidiary holding that "the constitutional standard for effective counsel is no more stringent in capital cases than in cases where less severe punishments are imposed." (Slip op. at 1247). This latter holding flies in the fact of the common understanding of the uniqueness of capital cases, as expressed by the Supreme Court in Lockett v. Ohio:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the

> conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases.

Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978).

Counsel for the defendant was ineffective at the sentencing phase of the trial. This ineffectiveness was starkly demonstrated by the failure of counsel to present any testimony at the sentencing hearing. The majority and district court opinions imply that counsel's failure is excusable because Proffitt was tried in 1974. These opinions, along with others, suggest that the idea that a sentencing authority should consider aggravating and mitigating circumstances originated in the 1976 triology of case approving capital crime statutes in Florida and Georgia and

disapproving such a statute in North Carolina. Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); Gregg v. Gerogia,428 U.S.153, 96 S. Ct. 2909, 49 L. Ed. 859 (1976). Nothing could be further from the truth, as illustrated in the early opinion by Justice Black in Williams v. New York:

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.
>
> . . .
>
> A sentencing judge . . . is not confined to the narrow issue of guilt. His tasks within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilty has been

> determined. Highly relevant--if not essential--to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. . . .

Williams v. New York, 337 U.S. 241, 246-47, 69 S.Ct. 1079, 1082-83, 93 L.Ed. 337 (1949).

In addition to the historical recognition of an individual's character at the sentencing phase, counsel should have been alerted to the importance of mitigating circumstances by the Florida capital crime statute enacted in 1972, Fla. Stat. § 921.141 (1973), after Furman v. Georgia had declared unconstitutional the statutes of a number of states. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). That statute explicitly provided:

> In the [sentencing] proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of

> the aggravating or mitigating circumstances enumerated in subsections [(5)] and [(6)].

§ 921.141(1) (emphasis added). Even though counsel may not have foreseen the Lockett rule, that a court may not preclude evidence of any mitigating circumstance, the Florida statute left no doubt that: (1) evidence of the enumerated mitigating circumstances, which included mental or emotional disturbance, was mandated, and (2) any evidence relevant to sentencing was permitted. Also available to guide counsel was the opinion of State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974), in which the Florida Supreme Court discussed the new statute thoroughly, and pointed out the advantage to the defendant of presenting matters in mitigation:

> The most important safeguard presented in Fla.Stat. § 921.141, F.S.A., is the propounding of ag-

> gravating and mitigating circumstances which must be determinative of the sentence imposed.
>
> . . .
>
> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overriden by one or more of the mitigating circumstances provided in Fla.Stat. § 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

Dixon, 283 So.2d at 8-10 (emphasis added).

Counsel for Proffitt was apprised by Dr. Crumbley of the defendant's unstable mental condition on the evening before the trial started. Although counsel was thus alerted to the possibility of mitigating psychiatric circumstances, he obtained no psychiatric evaluation and made no effort to seek a continuance to permit further investigation. Counsel testified at the habeas corpus hearing that he had visited with Proffitt a number of times and that

Proffitt had appeared lucid to him. Just as a psychiatrist should not assume the role of a lawyer, an attorney defending someone subject to the death penalty should not assume he is capable of evaluating whether his client, at the time the crime was committed, "was under the influence of extreme mental or emotional disturbance" or had a substantially impaired capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Fla. Stat. Ann. § 921.141(6)(b) and (f) (West Supp. 1981). This court has long recognized the responsibility of counsel to acquire expert psychiatric assistance when a defendant's mental condition may be critical to the outcome of his case. Beavers v. Balkcom, 636 F.2d 114 (5th Cir. Unit B 1981); United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976).

At the habeas hearing, counsel also stated that he did not engage in any separate and distinct preparation for the penalty phase, but prepared for that part of the trial in conjunction with his preparation of the case as a whole. He said that he had no strategy for the penalty stage but that his approach to that stage was dependent upon what occurred during the guilt phase. With only a thirty-five minute break between the end of the guilt phase and the beginning of the sentencing phase of the trial, counsel obviously had no opportunity to remedy his inadequate preparation. This failure to investigate the entire area of his client's mental condition and possible mitigating circumstance strikes at the core of ineffective assistance of counsel. An attorney cannot make a wise choice of strategy without meeting the initial duty to

investigate. Beavers v. Balcom, 636 F. 2d 114.

> The lawyer also has a substantial and very important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant himself. Information concerning the defendant's background, education, employment record, mental and emotional stability, the family relationships and like will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

A.B.A. Project on Standards for Criminal Justice, Standards Relating to: The Prosecution Function and The Defense Function, 227 (1970) (emphasis added).

The Florida statute and the Dixon opinion made clear that an attorney has, and had in 1974, an obligation to investigate the possible existence of psychiatric

evidence bearing on the statutory mitigating circumstances. The existence of such evidence might have made the difference between life and death for Proffitt. Counsel's failure to have his client examined by a psychiatrist under such circumstances was automatically ineffective assistance.

In its denial of habeas corpus, the district court relied in part on the fact that the state trial judge obtained two psychiatric evaluations before imposing a final sentence. Such reliance was unwarranted. Most important, the jury did not hear the testimony before making its sentencing recommendation. Furthermore, the testimony was aimed at the defendant's competency rather than at mitigating circumstances and was presented by court-appointed psychiatrists not secured on behalf of the defendant. The innovation

brought about by the Florida 1972 statute which governed this trial was participation by the jury in the sentencing process. Here, however, the jury was denied the presentation of any evidence, humanizing or psychiatric, which would provide a basis for recommending a sentence less than the death sentence.

For both sixth amendment and eighth amendment reasons, Proffitt cannot be put to death without a fair and complete sentencing trial at which he has an opportunity to present mitigating and psychiatric evidence.

May 31, 1983

ON PETITION FOR REHEARING

(Opinion September 10, 1982, 11 Cir., 1982, 685 F.2d 1227).

Before VANCE, KRAVITCH and CLARK, Circuit Judges.

KRAVITCH, Circuit Judge:

[1,2] The panel opinion, 685 F.2d 1227 (11th Cir. 1982), is hereby modified as follows:

1. A reference to a new footnote 40a is added at the end of section IV. C.1. at the end of page 1255, with the footnote to read:

> Our decision that the right of cross examination of adverse witnesses is extended to capital sentencing proceedings is necessarily limited to the facts of the case before us, involving psychiatric reports.

2. The text beginning with the second complete paragraph on page 1257 (beginning "The state argues that even . . .") and continuing through the first full paragraph on page 1258, ending with

footnote 46, is deleted and the following is substituted therefore:

> The state argues that even if appellant was entitled to attend the hearing his attorney waived that right. We reject this argument.

Early Supreme Court cases held that the right to presence in capital cases is so fundamental that the defendant cannot waive it. *Diaz v. United States*, 223 U.S. 442, 455, 32 S.Ct. 250, 253, 56 L.Ed. 500 (1912); *Hopt v. Utah*, 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884). *Accord Near v. Cunnington*, 313 F. 2d 929, 931 (4th Cir. 1963). [43] More recently, commentators have interpreted dictum in *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970), as authorizing a limited exception to the no-waiver rule for defendants who wilfully disrupt their trials, 3 C. Wright, Federal

Practice and Procedure §723 (Supp. 1980 at 754 n. 28); 8 B.J.Moore, Federal Practice ¶43.02[2] at 43-02 [2] at 43.9 (2nd ed. 1981). 44/ The state does not claim that appellant disrupted or hendered any part of his trial, however, hence such exception would be inapplicable to this case. In *Drope v. Missouri*, 420 U.S. 162, 182, 95 S.Ct. 896, 909, 43 L.Ed. 2d 103 (1975), the Supreme Court indicated that the issue of waiver of presence in a capital case may be subject to reconsideration, but did not expressly overrule its decision in *Diaz* and *Hopt*.

We need not decide the issue of whether presence of a capital trial ever is waivable, however, for here, even if we assume that the right to presence in a capital case may be waived no knowing and voluntary, and therefore, no

effective waiver was made. [45] Appellee does not deny that appellant was neither apprised of the hearing with Dr. Coffer nor afforded an opportunity to assert his right to a hearing; hence appellant did not knowingly or voluntarily waive his right to presence. [46]

3. An additional paragraph is to be added on page 1270 at the end of the majority opinion which reads:

> The Supreme Court of the United States has granted certiorari and heard oral arguments in a case which may have an impact on the analysis of the aggravating circumstances issue. *Barclay v. Florida*, 411 So. 2d 1310 (Fla. 1982), *cert. granted*. _____U.S._____, 103 S.Ct. 340, 74 L.Ed. 2d 382 (1982). Following the procedure set forth in the majority opinion of the en banc court in *Ford v. Strickland*, 696 F. 2d 804 at 807 (11th Cir. 1983), on remand the district court is to consider the effect that *Barclay* may have on the grant of habeas corpus relief and the procedure that is to be used in the district court while the *Barclay* case is pending in the Supreme Court.

The petition for panel rehearing is DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES WILLIAM PROFFITT,

Petitioner,

v. CASE NO. 79-655 CIV-T-H

LOUIE L. WAINWRIGHT, Secretary, Dept. of Offender Rehabilitation, State of Florida,

Respondent.

_____/

REPORT AND RECOMMENDATION

A state prisoner under sentence of death for murder brings this habeas corpus action attacking his conviction and his sentence on numerous grounds.[1] After consideration of the state court record,

[1] This matter comes before the undersigned pursuant to the Standing Order of this Court dated April 6, 1979. See also Local Rule 6.01(c)(17). See also Order of June 26, 1979.

evidence adduced at an evidentiary hearing, and extensive memoranda filed by the parties, I have concluded that the petitioner's challenges to his conviction do not support habeas relief. With respect to the petitioner's death sentence, however, I have concluded that the petitioner is entitled to relief on his claim that he was denied the effective assistance of counsel at the penalty stage of his trial. Accordingly, I recommend that the State be afforded an opportunity to conduct within a reasonable time another sentencing hearing pursuant to the Florida death penalty statute, Fla. Stat.

921.141. Failing that, an order should be entered directing the State to resentence the petitioner under Fla. Stat. 775.082 to life imprisonment.

I.

In the early morning hours of July 10, 1973, Joel Ronnie Medgebow, while asleep in a Tampa apartment, was stabbed to death by an intruder.[2] A short while later Mrs.

[2] This statement will simply outline the case. Details concerning the offense, the evidence, and the trial proceedings are set out in the Florida Supreme Court's decision (315 So.2d at 463-464) and in the United States Supreme Court's decision (428 U.S. at 245-247). Facts relevant to the petitioner's claims will be stated in connection with the discussion of each claim.

Mary Bassett, a boarder in the mobile home occupied by the petitioner and his wife, awoke to hear the petitioner tell his wife that he had just stabbed someone and was therefore leaving town. After the petitioner's departure, his wife called the police, and the investigation of the Medgebow murder then focused upon the petitioner.

The petitioner was eventually indicted and tried for the murder. At the guilt stage of a bifurcated trial, the jury found the petitioner guilty. After a sentencing

hearing, the jury returned an advisory verdict recommending that the petitioner be sentenced to death. The trial judge, in accordance with his written findings, followed the jury's recommendation and sentenced the petitioner to death. On appeal to the Florida Supreme Court, the petitioner's conviction and sentence were affirmed. Proffitt v. State, 315 So.2d 461 (Fla. 1975). The United States Supreme Court granted certiorari and, in a decision upholding the Florida death penalty statute, affirmed the judgment of the Florida Supreme Court. Proffitt v. Florida, 428 U.S. 242 (1976), reh. den., 429 U.S. 875.

The petitioner has subsequently filed two motions to vacate judgment and sentence pursuant to Fla.R.Crim.P. 3.850. In each instance, the trial court denied relief without an evidentiary hearing and the

Florida Supreme Court dismissed a subsequent appeal (360 So.2d 771 (Fla. 1978); 372 So.2d 1111 (Fla. 1979)).[3] On June 19, 1979, the Governor of Florida signed a death warrant authorizing the petitioner's execution.

The petitioner then filed this habeas action seeking relief from his judgment and sentence. On June 26, 1979 this Court granted a stay of the petitioner's execution. After referral of the matter to

[3] It is appropriate here to note, as was pointed out in this Court's Order of June 26, 1979, that the respondent has not raised any question concerning the exhaustion of state remedies.

this magistrate, an evidentiary hearing was held on the issues thought to warrant such a hearing. Memoranda were thereafter filed by the parties on those issues, as well as on the issues which did not require an evidentiary hearing.[4]

[4] In this case, the respondent contends that at least seven of the petitioner's claims are foreclosed by Wainwright v. Sykes, 433 U.S. 72 (1977). That decision held that a habeas petitioner's failure to comply with a state procedural rule requiring the assertion of claims prior to trial forecloses federal habeas review of those claims unless the petitioner shows cause for the noncompliance and actual prejudice from the alleged constitutional violation. It was decided, however, at the hearing conducted to determine which issues required an evidentiary hearing to pretermit consideration of the Wainwright

(cont'd on next page)

The petitioner's claims will be

v. Sykes questions primarily because the petitioner had not filed a reply to the response setting out his assertions of "cause" and "prejudice". In this posture the Sykes issues had not crystallized. Accordingly, the merits of the petitioner's claims were to be considered and, if relief seemed appropriate on a claim as to which the respondent had invoked Sykes, the Sykes issues would then be addressed. Because none of the claims involving Sykes warrant relief, it has not been necessary to decide the Sykes questions.

After both the initial hearing and the evidentiary hearing, the Fifth Circuit in Madeley v. Estelle, 606 F.2d 560 (5th Cir. 1979) remanded a habeas action to the district court because that court had denied relief on the merits prior to deciding a Wainwright v. Sykes claim of procedural default. The Fifth Circuit, however, on at least two occasions has considered the merits of a claim without deciding Sykes questions and thus Madeley does not appear to have established an

(cont'd on next page)

addressed in the order in which they appear

inflexible rule requiring the consideration of all Sykes issues before proceeding to the merits. Bryan v. Wainwright, 588 F.2d 1108 (5th Cir. 1979); Spinkellink v. Wainwright, 578 F.2d 582, 591-592 (5th Cir. 1978). A number of considerations warrant passing over the Sykes contentions in this case: (1) at the time of the hearing held to determine the issues requiring an evidentiary hearing, those contentions were not fully ripe since the petitioner had not set forth his claims of "cause" and "prejudice"; (2) because the respondent in a number of instances was asserting Wainwright v. Sykes, in an attempt to preclude consideration of claims barred by state procedural rules other than "contemporeaneous objection" rules, difficult questions were presented which the Supreme Court had not addressed in Sykes, see 433 U.S. at 88 n.12; Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979); (3) Sykes does not apply if the claim is decided by the state courts on the merits and thus, because no opinion had been written in petitioner's case on most of the claims involving Sykes,

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in the petitioner's memoranda.

The petitioner contends that the trial court's findings with respect to aggravating and mitigating circumstances violated his right to due process and to be free of cruel and unusual punishment. This contention, however, does not support federal habeas relief.

it would be very hard to tell whether Sykes would be applicable, see Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979); and (4) consideration of the petitioner's "cause" and "prejudice" arguments would not only expand the already substantial number of issues to be heard at an evidentiary hearing, but also, in light of the only recently developing case authority defining "cause" and "prejudice," would present troublesome question.

A. The petitioner asserts that the trial judge erroneously found certain statutory aggravating factors and also improperly considered nonstatutory aggravating factors. He does not contend, however, that no statutory aggravating circumstance was proven.[5] The Supreme Court indicated in petitioner's case, Proffitt v. Florida, 428 U.S. 242 (1976) (opinion of Stewart, Powell and Stevens, JJ.), that where at least one statutory

[5] Such a contention would be without merit. The aggravating circumstance of committing a premeditated murder during the commission of a felony is clearly supported by the record.

aggravating circumstance was established and where no mitigating circumstance was found, the death penalty could be imposed, consistent with the Constitution, without considering whether each of the statutory aggravating factors found by the trial court was supported by the evidence, (id. at 256 n.13), or whether the trial court considered nonstatutory aggravating factors, (id. at 250 n.8, 256 n.14).

The petitioner contends, however, that the trial court either did not, or could not, find that there was no statutory mitigating factor, because, in his view, he had no significant prior criminal history, which is a mitigating factor under the Florida statute. See Fla. Stat. 921.141(6)(a). The trial court, after stating that the statutory mitigating circumstances were "primarily negated," found with respect to prior criminal

history that the petitioner "was convicted in 1967 of Breaking and Entering without permission" (I R.58).[6] The court did not expressly state whether, in its view, this conviction precluded a finding of the mitigating circumstance of no "significant history of prior criminal activity." Fla.Stat. 921.141(6)(a). The United States Supreme Court, however, read the trial court's findings as holding that no statu-

[6] "R" refers to the multi-volume record on appeal from petitioner's trial. "H.T." refers to the two volume transcript of the evidentiary hearing conducted in this habeas proceeding. Volume I consists of page 1 to 212; Volume II consists of pages 213 to 487.

tory mitigating factors existed (428 U.S. at 247, 256 n.13). Under this reading, the petitioner's challenge to some of the findings regarding aggravating circumstances would be without merit since the death penalty is constitutionally authorized if one of the statutory aggravating circumstances is found and no mitigating circumstance is present.

The petitioner argues that the breaking and entering conviction could not reasonably be thought to be a significant criminal history. The trial court, of course, did not say that it was. What the court did say was that the petitioner had a prior conviction for breaking and entering, and that the mitigating circumstances were "primarily negated." In stating that the mitigating circumstances were "primarily negated," the trial court apparently meant that even if the mitigating circumstance of

no significant criminal history was not wholly absent, it, in all events, was not entitled to any weight.[7] A finding that a mitigating circumstance is entitled to no weight would be the practical equivalent of a finding that it is not present. Accordingly, an inquiry into a trial court's findings concerning aggravating circumstances would be inappropriate where at least one statutory aggravating circumstance is established and the mitigating circumstances are either absent or without

[7] This conclusion is supported by the Supreme Court's view that the trial court found no mitigating circumstances.

weight.

In any event, in this case it seems plain that, however the trial court's findings regarding mitigating circumstances are viewed, the Supreme Court indicated that an inquiry into the findings of aggravating circumstances was not warranted.

B. Moreover, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), establishes that a federal habeas court is not authorized to conduct the type of review of the state trial court's findings which the petitioner seeks here. The court in Spinkellink explained (id. at 605-606):

> If a state has such a properly drawn statute - and there can be no doubt Florida has - which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in Furman [v. Georgia, 408 U.S. 238 (1972)] have been conclusively removed. For us to read these cases [Proffitt and the other

> death penalty cases] otherwise would thrust this Court and the district courts into the substantive decision making of the state court sentencing process which is rightfully reserved to the Florida state judiciary under Section 921.141. Under the Constitution, as well as fundamental notions of federalism and comity, that is not the role of the federal courts. (footnotes omitted)

On the petitioner's direct appeal, the Florida Supreme Court considered, and rejected, a claim that the trial court ignored mitigating evidence and improperly found aggravating circumstances that were not supported by the evidence or were not listed in the statute (315 So.2d at 466-467; Pt. Ex. 10, 11). In other words, the Florida Supreme Court concluded, in affirming the petitioner's death sentence, that the trial court had adequately conformed to the statute.

Therefore, since the United States Supreme Court has held the Florida statute to be constitutional, and the Florida

Supreme Court has upheld the application of that statute to the petitioner, this Court is not authorized to review whether some of the trial court's findings on aggravating circumstances are not contemplated by the statute or are unsupported by the evidence.[8]

[8] It should be noted that the petitioner's contention is not properly viewed as a challenge to the sufficiency of the evidence, which is reviewable under Jackson v. Virginia, 99 S.Ct. 2781 (1979), but as a claim that the statute was not correctly applied, which, under Spinkellink, is not ordinarily a matter for federal habeas review. There is no basis for a contention that the imposition of the death sentence on petitioner is so shocking that under Spinkellink federal habeas relief is justified. The United States Supreme Court
(cont'd on next page)

III.

The petitioner argues that the trial court unconstitutionally limited consideration of mitigating evidence to those circumstances set out in the statute. This contention is not supported by the record.

In Proffitt the Supreme Court noted that the Florida statute did not limit the mitigating factors that could be introduced. 428 U.S. at 250 n.8; see also Lockett v. Ohio, 438 U.S. 586, 606

reviewed the Florida statute in the context of the petitioner's case and plainly did not view the death sentence as one which in Spinkellink's language, "would be patently unjust and would shock the conscience" (578 F.2d at 606 n.28).

(1978). Accordingly, the petitioner could have offered any pertinent mitigating evidence he desired at the sentencing hearing. Spinkellink v. Wainwright, supra, 578 F.2d at 620-621. The petitioner, however, elected not to present any evidence.

A. The petitioner, nevertheless, contends that the trial court's instructions improperly limited the jury's consideration to the statutory mitigating factors, and did not instruct the jury that it could consider any factor in mitigation and had inherent power to grant mercy. At the outset it is appropriate to note that this argument is not especially forceful since the jury verdict is only advisory. In any event, in the circumstances of this case the instructions were not unconstitutionally confining. The trial court, following the lines of the statute,

instructed the jury that in considering aggravation it was limited to the factors enumerated in the statute (IV R.529-530), but did not state that the jury was similarly limited when considering mitigation. Rather, the court advised the jury (IV R.531):

> Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider if established by the evidence, are these: [the court then stated the factors set out in the statute]

Regardless of whether this instruction would be adequate where nonstatutory mitigating evidence was introduced, it is sufficient here in light of petitioner's failure to offer any nonstatutory mitigating evidence. Significantly, petitioner's counsel argued the question of penalty to the jury only in terms of the

statutory mitigating factors. Moreover, the petitioner does not now assert that he requested an instruction expressly advising the jury that they could consider non-statutory mitigating factors. Thus, if the jury's consideration was limited, those limits resulted from the petitioner's approach, and not the court's instructions. In light of the evidence presented, the court's instructions were certainly appropriate.

The petitioner contends in a similar vein that the court should have advised the jury that it had interent power to grant mercy. While the jury may in fact have such power - although that is not necessarily true as to the sentencing phase in Florida - the petitioner cites no authority requiring a trial court to instruct a jury that, as an alternative, it can ignore the court's proper instructions and render

a verdict based on mercy, even if contrary to the law and the facts. Indeed, it would seem that such an instruction would inject into the sentencing process the kind of unguarded discretion that was condemned in Furman v. Georgia, supra. See Roberts v. Louisiana, 428 U.S. 325, 334-335 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) Accordingly, the trial court did not err in failing to instruct the jury that it had the inherent power to grant mercy.

B. The petitioner contends also that the trial court refused to accept evidence proffered in mitigation. As previously indicated, at the sentencing hearing the petitioner elected not to present any evidence. The petitioner complains, however, that he was not permitted to present the testimony of Dr. Sprehe.

After the sentencing hearing had been completed without the petitioner offering

any evidence, the court on its own decided to appoint two psychiatrists one of them Dr. Daniel J. Sprehe, to examine the petitioner. A report was submitted to the court and Dr. Sprehe was expected to appear before the court for examination. However, Dr. Sprehe was not present at the time set for the hearing. Although the petitioner's counsel requested the opportunity to examine Dr. Sprehe concerning whether the petitioner's "resort to violence is [an] involuntary type action," the court elected to proceed with the sentencing.

The court's actions did not unfairly deprive the petitioner of the opportunity to offer mitigating evidence. The Florida law provides for a separate sentencing proceeding, Fla. Stat. 921.141(1), and that proceeding was held. The petitioner could have, but did not, present the testimony of Dr. Sprehe, or any other psychiatrist, at

the time. The court's subsequent appointment of the psychiatrists did not expand the petitioner's right to present evidence.[9] Accordingly, when the trial court decided to proceed without the testimony of Dr. Sprehe, the petitioner did not lose any right to which he was entitled.

Moreover, assuming that the petitioner had a constitutional right at the time of sentencing to present the testimony of Dr.

[9] Whether the submission of a report by the psychiatrist required that the petitioner be given an opportunity to explain adverse comments in the report presents a different issue. See Part XVI, infra.

Sprehe as to whether the petitioner's resort to violence was an involuntary action, the denial of that right was harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Dr. Sprehe testified at the evidentiary hearing in this case that in his opinion the petitioner had volitional control over himself at the time he committed the crime, and that his capacity to conform to the requirements of law was not substantially impaired (H.T. 114). Although on cross-examination Dr. Sprehe stated, after certain circumstances were mentioned to him of which he was unaware, that, if the circumstances were true he might be less certain of his opinion, he also indicated that he might not change his opinion at all (H.T. 139). The doctor did not indicate at any point, however, that the petitioner may have been acting

involuntarily, or that his capacity to conform to the requirements of law was substantially impaired. In short, there was nothing in Dr. Sprehe's testimony that was favorable to the petitioner on the question of mitigating circumstances. Therefore, even if the petitioner had a constitutional right to present the doctor's testimony, the denial of that right was harmless error beyond a reasonable doubt.

Similarly without merit is the petitioner's contention that he was denied the right to produce mitigating circumstances as a result of the trial court's denial of his motion to dismiss. The petitioner had contended prior to trial that the indictment should be dismissed on the ground that the Florida statute was unconstitutional because it precluded the use of nonstatutory mitigating circumstances (I R.24-25). The Supreme Court, of course,

pointed out that the Florida statute was not so limited and thus the motion to dismiss was properly denied. Moreover, the denial of the pre-trial motion to dismiss obviously did not preclude the defendant from offering any mitigating evidence he desired to present.

For these reasons, the petitioner cannot successfully contend that the trial court denied him the opportunity to present mitigating circumstances.

IV.

The petitioner argues that the Florida death penalty statute is unconstitutional because it requires the mitigating circumstances to outweigh the aggravating circumstances and thus requires the imposition of the death penalty if the circumstances are in equipoise. Assuming that in this situation it is meaningful to talk of the possibility of a state of equipoise, the

Supreme Court has already indicated that requiring the mitigating circumstances to outweight the aggravating factors does not render the Florida statute unconstitutional. In Proffitt, the Court pointed out that under the statute the mitigating circumstances must outweigh the aggravating circumstances (428 U.S. at 248, 250), but still concluded that "[o]n its face the Florida system thus satisfies the constitutional deficiences identified in Furman" (428 U.S. at 253). Clearly the Supreme Court did not think it constitutionally necessary that the statute be phrased to require the aggravating circumstances to outweigh the mitigating factors.

V.

The petitioner also contends that it is unconstitutional for Florida to consider as an aggravating circumstance that the murder

occurred during the commission of a felony. See Fla. Stat. 921.141(5)(d). He argues in essence that individuals convicted of a felony-murder are, irrationally, automatic candidates for the death penalty, since one aggravating circumstance is necessarily present in that situation, whereas other murderers who have acted with premeditation do not have that automatic strike against them. The petitioner relies on State v. Cherry, 257 S.E. 2d 551 (N.C. 1979) which held a death sentence invalid where the killing was committed without premeditation in the course of a felony. The court added in Cherry, however, that where the defendant was convicted of murder on the basis of premeditation, it was appropriate to consider, as an aggravating factor, that the murder was committed during one of the enumerated felonies (id. at 568). That is

precisely the situation here. The trial court in imposing sentence found as an aggravating circumstance that the petitioner committed the murder "from a premeditated design and while [he] was engaged in the commission of a felony" [I R.57) (emphasis added). Accordingly, since the petitioner was found to have acted with premeditation, his contention is inapposite here.

VI.

The petitioner asserts that he was constitutionally entitled at the sentencing hearing to a different jury than the one that considered his guilt or innocence. He argues that the jury which found guilt may have been unreceptive at the penalty phase to pleas which were inconsistent with defenses raised previously. The Supreme Court held in McGuatha v. California, 402 U.S. 183, 208-222 (1971) that a defendant

in a capital case is not constitutionally entitled to a bifurcated trial. Although portions of the Court's opinion in McGuatha concerning the discretion of the jury may be inconsistent with later Eighth Amendment cases, see Gregg v. Georgia, 428 U.S. 153, 195-196 n.47 (1976), the Court's ruling on the issue of bifurcated trials appears to remain binding precedent. See Corbitt v. New Jersey, 439 U.S. 212, 218 n.8 (1978).

Furthermore, even if the petitioner were constitutionally entitled to a bifurcated trial, he cites no authority which supports his contention that the jury at the sentencing hearing was constitutionally required to be different from that which decided his guilt. The petitioner's argument, that without a new jury he was placed in the awkward position of having presented prior inconsistent positions, it not particularly compelling

since the petitioner did not put on a defense and simply put the prosecution to its proof. His argument certainly does not justify the conclusion that the use of a different jury at the sentencing hearing is a fundamental right warranting constitutional status.

Finally, the petitioner's position is further undermined by the fact that in Florida it is the trial judge, and not the jury, who is the sentencing authority. The petitioner does not contend that a judge when considering a sentence is unable to disregard inconsistent positions taken by the defendant at the guilt phase.

For these reasons, the petitioner's constitutional rights were not violated because the sentencing hearing was conducted before the same jury that had found him guilty.

VII.

The petitioner further contends that his conviction was tainted by a jail physician's disclosure of petitioner's confidential admissions to him that the petitioner had committed the murder. This claim is without merit.

Approximately three weeks prior to his trial, the petitioner asked to see Dr. James Crumbley, Jr., a consulting physician employed by the Hillsborough County Sheriff to render diagnostic services for inmates at the Hillsborough County Jail (III R.393). Dr. Crumble provided psychiatric services based upon prior psychiatric training, although he was not a psychiatrist (III R.390). Dr. Crumbley told the petitioner near the outset of their conversations that he was a psychiatrist and accordingly would keep in confidence anything the petitioner said to

him (III R.400).

The petitioner told Dr. Crumbley that he had killed "the coach",[10] that he had an urge to kill, and that he was concerned, because he expected to be acquitted, that he would kill again.

On Sunday, March 10, 1974, Dr. Crumbley called the petitioner's attorney and indicated that he was going to advise the State of petitioner's statements. The following morning Dr. Crumbley provided the information to the prosecution.

[10] The victim in petitioner's case was a high school wrestling coach.

After its other testimony had been presented at the guilt phase of the trial, the State offered Dr. Crumbley's testimony. Following a proffer to the court out of the presence of the jury, and an unreported argument in chambers, the State rested without Dr. Crumbley's testimony being introduced.

At the penalty phase of the trial the State offered the testimony of Dr. Crumbley. Defense counsel at this point advised the court that "the defendant has requested me to waive his confidential privilege which he had between the Doctor and himself concerning any communications" (IV R. 497). The petitioner desired to use Dr. Crumbley's testimony to establish the mitigating circumstances of having acted under extreme mental or emotional disturbance, or of having a substantially impaired capacity to conform to the

requirements of the law.

The petitioner now contends that various constitutional rights of his have been violated by the use of Dr. Crumbley's testimony. There is simply no basis for this contention. Dr. Crumbley's testimony was not admitted at the guilt stage of the trial, and the petitioner expressly waived any objection he had to the introduction of the testimony at the sentencing hearing.

The petitioner argues further that the prosecutors entire trial strategy was influenced by his knowledge of the petitioner's conversations with Dr. Crumbley and that therefore the prosecutor was disqualified from handling the petitioner's case. The petitioner, however, does not support his broad assertion by stating in what way the prosecutor's trial strategy was influenced by Dr. Crumbley's information. The

prosecutor would, in all probability, have proceeded at the guilt stage in exactly the same manner without Dr. Crumbley's information since he did not attempt to introduce Dr. Crumbley's testimony until he had presented all his other evidence. This conclusion is further supported by the fact that the prosecutor did not receive Dr. Crumbley's information until the morning of the trial. Moreover, there is nothing in Dr. Crumbley's testimony, or in the other testimony which was presented, which suggests that Dr. Crumbley's information led to any of the evidence produced by the prosecutor. Dr. Crumbley's information thus does not appear to have provided any assistance to the prosecutor until it was admitted at the sentencing hearing with the petitioner's express acquiesence.

In any event, there is no foundation for concluding that the prosecutor received

such broad and detailed information about the petitioner's case that, as in the case of a conflict of interest situation arising out of an attorney-client relationship, the prosecutor should have been disqualified. See Young v. State, 177 So.2d 345 (Fla. App. 1965). Rather, the appropriate remedy for a violation of the petitioner's rights by Dr. Crumbley was the suppression of Dr. Crumbley's tesimony and any evidence that might have been the fruit of the violation. See Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), cert. granted, 48 U.S.L.W. 3602 (1980). Since no evidence stemming from the petitioner's conversation with Dr. Crumbley was used at trial until after the petitioner's express waiver, the petitioner's conviction and sentence are not rendered invalid by Dr. Crumbley's alleged breach of his confidential relationship.

VIII.

The petitioner contends, based upon Smith v. Estelle, supra, that psychiatric evidence was used against him at the sentencing phase without adequate warning of his right against self incrimination and his right to counsel. For several reasons, the petitioner is not entitled to relief on this claim.

In this case, after the jury had recommended the death penalty, the trial judge, in open court and in the presence of the defendant and his counsel, stated (IV. R.536):

> I think, from the testimony we have heard, at this point, it might be advisable to have the defendant examined prior to the imposition of sentence by two of the Court-approved psychiatrists, if you each concur in that opinion.

The petitioner's counsel responded (id. at 536-537):

> I have no objection to that, your Honor. I have not discussed this

> with the defendant. I do not know his position. However, as his counsel, I have no objection.

No objection was ever raised to the petitioner being examined by the court-appointed psychiatrists, Drs. Daniel J. Sprehe and Robert H. Coffer. Indeed, at the time the psychiatrists were to testify, defense counsel stated for the record that the reason for the examination was to determine "whether the defendant's emotional and mental condition fit within any of the mitigating circumstances," thereby further indicating approval by the defense of the psychiatric examinations (IV R.532).

The petitioner contends, nevertheless, that he was not advised that he did not have to talk to the psychiatrists, and that under Smith v. Estelle, supra, evidence based upon the psychiatric examinations may not be used against him. It is not

reasonable, however, to extend Smith v. Estelle, supra, to the circumstances presented here. In Smith a psychiatrist was appointe d to examine the defendant without the knowledge of the defendant's counsel. Here, on the other hand, the appointment of psychiatrists was raised and decided upon in open court and in the presence of the defendant and his counsel. It must be presumed that a defendant's attorney is aware of a defendant's right against self-incrimination and will invoke that right under appropriate circumstances.[11] See Estelle

[11] To the extent an attorney fails to
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v. Williams, 425 U. S. 501, 512 (1976). Accordingly, when a defendant is accompanied by his lawyer, there is no justification for requiring, as a constitutional imperative, that he be expressly advised that he does not have to talk to a court-appointed psychiatrist.

Moreover, in this case any use of the psychiatric testimony by the State was consistent with Smith v. Estelle, supra. The Fifth Circuit in Smith ruled that the State can use evidence gathered during a psychiatric examination if the defendant

protect reasonably a defendant's constitutional rights, a claim of ineffective assistance of counsel may be presented.

voluntarily consents to the examination. Here, the trial judge asked both counsel if they concurred in his view that psychiatric examinations were in order, and the petitioner's counsel, for tactical reasons, advised that he had no objection to the appointment of psychiatrists. This plainly constitutes voluntary consent to the examinations, and thereby precluded any contention that the petitioner's interviews were compelled. Estelle v. Williams, supra.

In addition, as explained in more detail in Parts XV and XVI, infra, the information provided to the psychiatrists was not used against the petitioner. Briefly stated, the trial judge was in agreement with the jury's recommendation of death and appointed the two psychiatrists simply to satisfy himself that no psychiatric mitigating circumstances were

present. Because the doctors did not find any mitigating factors, their information was not considered further in imposing sentence.

For these reasons, the petitioner's claim that he was not warned of his right not to talk to the psychiatrists is without merit.

IX.

The petitioner contends that his death sentence should be set aside because there is not sufficient evidence in the record to support the finding that the petitioner is a "danger and [a] menace to society" as a result of a propensity to commit murder. This claim, plainly, does not provide a basis for relief.

As explained in Part II, supra, it is not necessary to establish that each aggravating circumstance listed in the trial court's findings is supported by

substantial evidence. Accordingly, an insufficiency of evidence that the petitioner was a danger and menace to society would not support the overturning of the petitioner's death sentence. [12]

X.

The petitioner claims that when his wife testified against him, her testimony

[12] It is appropriate to note, however, that the record does contain sufficient evidence to permit the finding under Jackson v. Virginia, supra, that the petitioner was a danger and menace to society. The circumstances of the murder, alone, would justify the conclusion that the petitioner was a danger and menace. The killing of the sleeping victim, a total stranger, was absolutely senseless and without provocation. In addition, the peti-
(continued on next page)

violated his marital communication privilege and denied his right to confront witnesses. This claim also does not warrant habeas corpus relief.

Mrs. Proffitt testified that the petitioner returned home in the early morning hours of July 10, 1973, that they had a conversation while he packed some belongings, that he left, and that she thereafter called the police who came to her trailer home (III R.325-328). Mrs. Proffitt did not state what she had discussed with her husband, or what she had told the police. Defense counsel did not object to her testimony concerning her call to the police.

The petitioner contends that Mrs. Proffitt's testimony violated his marital communication privilege because her statement that she called the police necessarily implied that the petitioner had made

tioner told Dr. Crumbley that he had an uncontrollable desire to kill, that, as a result, he was concerned that he would do damage to people in the future, and that tensions were building concerning a particular inmate at the jail.

admissions to her upon his return home. By this contention, the petitioner seeks to raise a question concerning the application of the Florida marital communication privilege. But federal courts do not sit to review state evidentiary questions. Mercade v. Massey, 536 F.2d 107, 108 (5th Cir. 1976). Rather, "[t]he function of [federal] habeas corpus, while of utmost importance, is limited to correcting errors of federal constitutional dimensions." Robinson v. Wainwright, 387 F.2d 438, 441 (5th Cir. 1967). Thus, the application in a given case of any doctrine which Florida had adopted as part of its criminal law and procedure is a matter of state law not subject to review in a federal habeas action. Hall v. Wainwright, 493 F.2d 37, 39 (5th Cir. 1974). It has, accordingly, been held that the application of the marital privilege is a state law question

which cannot be reviewed by a federal court in a habeas corpus suit. Crow v. Eyman, 459 F.2d 24, 25 (9th Cir. 1972). For this reason, the petitioner cannot properly raise in this action the contention that his marital privilege has been violated.

Moreover, the petitioner's claim that his marital privilege was violated is without merit under state law. Florida, which takes restrictive view of the marital privilege, considers the privilege waived if not asserted by an objection. Kerlin v. State, 352 So.2d 45, 52 (Fla. 1977). There was no objection made to Mrs. Proffitt's testimony that she called the police, and therefore the petitioner's privilege was waived as to any confidential marital communication which may be implicit in that testimony.

The petitioner contends further that his constitutional right to confront

witnesses was violated by his wife's testimony. Mrs. Proffitt, however, testified in person and the defendant obviously had a right to cross-examine her. This case is unlike Douglas v. Alabama, 380 U.S. 415 (1965), cited by petitioner, in which a defendant was unable to cross-examine a witness because the witness had invoked his right against self-incrimination. There is nothing in the record which suggests that Mrs. Proffitt would not have answered any questions asked here by defense counsel. The fact that the answers might have been harmful to the petitioner does not raise his failure to interrogate her to the level of a constitutional denial of the right of confrontation. Cf. McGautha v. California, supra. 402 U.S. at 213.

XI

The petitioner also contends that his marital privilege was violated by Mary Bassett's testimony that she had overheard the petitioner tell his wife that he had just killed a man. This contention was considered, and rejected, by the Florida Supreme Court. Proffitt v. State, supra, 315 So.2d at 464-465. For the reasons just set forth, this is primarily a question of state law not subject to review in a federal habeas action.

The petitioner seeks to elevate his claim to the constitutional level by asserting that the disclosure by Mary Bassett violated his right to privacy. The petitioner acknowledges that Mrs. Bassett was not an agent of the State and that therefore the Fourth Amendment is not implicated. Accordingly, in order to prevail the petitioner must establish that

the Constitution requires a State to adopt a marital privilege which, at the least, precludes the admission in evidence of any private marital conversation which is overheard. Indeed, since the Florida Supreme Court concluded that the petitioner made no attempt to utter his communication in confidence, the petitioner can succeed only if the Constitution forbids the admission of any marital communicatiion. Although a State may adopt a marital privilege sufficiently broad to protect the petitioner in these circumstances, the petitioner has cited no authority which suggests that the Constitution compels such an expansive rule. To the contrary, the waning of the privilege, and its dubious policy basis, see C. McCormick, Evidence §86 (2d Ed. 1972), belie the view that a broad marital privilege is a fundamental right protected by the Constitution.

There is thus no support for the petitioner's contention that his constitutional rights were violated by the introduction of Mary Bassett's testimony.

XII.

The petitioner contends "that the trial court's instructions on flight [to avoid prosecution] unconstitutionally allowed the state to establish guilt without proving each element of the offense charged beyond a reasonable doubt, and further impermissibly shifted the burden of proof to the petitioner to disprove his guilt." The petitioner has clearly failed to satisfy his heavy burden of showing that the instruction on flight was not only erroneous, but so infected the entire trial that his conviction violated due process.

The trial court instructed the jury, inter alia, (IV R.481-482):

> Now, if you believe beyond a reasonable doubt that the defendant fled from the jurisdiction of the court in order to avoid or defeat prosecution, you may consider that as a circumstance pointing to guilt. If an explanation is given which satisfies you that the flight was not to avoid or defeat prosecution, or if it raises a reasonable doubt in your mind, you will disregard the circumstances of flight. However, the explanation given must not only be reasonable but it must be credible or sufficiently so to raise a reasonable doubt in the minds of the jury who are the sole judges of its reasonableness and probability, as well as its credibility.

Although the defendant objected to any instruction on the issue of flight, he neither objected to the form of the instruction given nor offered any instruction of his own on the subject (IV R.491).

In Henderson v. Kibbe, 431 U.S. 145, 154 (1977), the Supreme Court, after noting that "[i]t is the rare case in which an improper instruction will justify reversal

of a criminal conviction when no objection has been made in the trial court," stated:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 U.S., at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" id. at 146. (footnote omitted)

The Fifth Circuit has subsequently explained that "[b]efore a federal court may grant relief under 28 U.S.C.A. §2254 based on an alleged error in a state trial court's unobjected to charge, the error must be so egregious as to rise to the level of a Constitutional violation or so prejudicial as to render the trial itself fundamentally unfair." Bryan v.

Wainwright, 588 F.2d 1108, 1110-1111 (5th Cir. 1979). It is questionable whether the instruction on flight constituted error and it plainly did not amount to a constitutional error.

As indicated, the trial court instructed the jury that "[i]f you believe beyond a reasonable doubt that the defendant fled from the jurisdiction of the court in order to avoid or defeat prosecution, you may consider that as a circumstance pointing to guilt" (emphasis added). This instruction is not constitutionally impermissible since it is recognized that "evidence of flight may be relevant and a legitimate ground for the inference of guilt." United States v. Alonzo, 571 F.2d 1384, 1386 (5th Cir. 1978), cert. den. 439 U.S. 847. Moreover, there is no constitutional violation simply because the court did not elaborate on related matters, as

contended by the petitioner. Bryan v. Wainwright, supra, (failure to define "depraved mind" did not amount to a constitutional violation); see also Henderson v. Kibbe, supra, 431 U.S. at 155. In this regard, it should also be added that the trial court fully instructed the jury on such matters as presumption of innocence, the State's burden to prove guilt beyond a reasonable doubt, and the appropriate consideration to be given to circumstantial evidence. The instruction on flight, of course, must be considered in light of all the instructions. Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). Certainly when all the instructions are taken together, the instruction on flight is not so deficient that it amounts to constitutional error. Cupp v. Naughten, supra.

There is no basis for the petitioner's further contention that the flight instruction allowed the jury to infer guilt unless the petitioner rebutted the inference beyond a reasonable doubt. The court, contrary to petitioner's reading, instructed the jury to disregard the inference if the petitioner's explanation raised a reasonable doubt as to whether there was a flight to avoid prosecution.

XIII.

The petitioner contends that his right to due process was violated when the prosecutor elicited testimony that the petitioner had refused to waive extradition, and when the prosecutor commented upon that testimony during closing argument. This claim is without merit.

A. Upon inquiry from the prosecuting attorney, a witness stated that the petitioner, after surrendering himself to

Connecticut authorities, refused to waive extradition to Florida (III R.341-342). No objection was made to the prosecutor's questions. During cross-examination, defense counsel elicited testimony that the petitioner had voluntarily surrendered in Connecticut, and that he had a legal right to contest extradition, just as an individual has a right to a trial (III R.350-351). Contrary to the petitioner's contention, there is no constitutional violation resulting from the testimony that the petitioner refused to waive extradition.

"[T]he mere violation of evidentiary rules by the state trial court does not in itself invoke habeas corpus relief, but only where the violation of the state's evidentiary rules results in a denial of fundamental fairness should habeas be granted." Anderson v. Maggio, 555 F.2d

447, 451 (5th Cir. 1977). Fundamental unfairness is said to be denied, in this type of situation, only if the prejudicial evidence which is erroneously admitted is "'material in the sense of a crucial, critical, highly significant factor.'" Id.

In this case, it is not at all clear that the testimony concerning the petitioner's refusal to waive extradition was admissible,[13] or that the petitioner

[13] The petitioner contends that his refusal to waive extradition, like the refusal to waive the right against self incrimination, is a matter which ordinarily may not be commented upon. There is, however, a vast difference between extradition and the right against self incrimination. Interstate extradition is "a summary and mandatory executive proceeding," which is not intended primarily as a protection for an accused, but as a means to enable a state to bring offenders to trial as swiftly as possible. Michigan v. Doran, 439 U.S. 282, 288(1978). Thus, it might be concluded that, when relevant, testimony can be adduced concerning an accused's refusal to waive extradition. Ordinarily such evidence would not be relevant since an inference of guilt does

did not waive any objection he had by his failure to assert it. In any event, it is plain that the admission of the testimony did not constitute a denial of fundamental fairness. The testimony was not emphasized, and viewing the evidence as a whole, it could only have had marginal effect. Moreover, the defense attorney probably eliminated most of the significance of the refusal to waive extradition when he elicited testimony indicating that the right to an extradition proceeding was a legal right to which the petitioner was entitled, like his right to trial. Certainly the evidence of the refusal to waive extradition was not "crucial, critical [and] highly significant."

not necessarily arise from a refusal to waive extradition. Here the refusal could be considered along with the testimony that the petitioner voluntarily surrendered as relevant to the matter of flight.

B. The petitioner also challenges the fact that the prosecutor, during his closing argument, commented on the petitioner's refusal to waive extradition (III R.450). At trial, the petitioner made no objection to the comment.

Federal habeas relief, based upon a prosecutor's alleged improper comment, is not justified unless the argument, when viewed in the context of the entire trial, is so prejudicial that it renders the trial fundamentally unfair. Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir. 1979). Great latitude is given a prosecutor in closing argument and, accordingly, a defect of constitutional proportions is not to be found in any but egregious cases. Id.

Assuming that the prosecutor's comment regarding the petitioner's refusal to waive extradition was improper, it clearly does not rise to the level of a constitutional

violation. The refusal to waive extradition, although mentioned, was not stressed during the argument. Moreover, as previously noted, the effect of the comment would be substantially eliminated by the testimony that the petitioner had a legal right to extradition proceedings, just as he had a right to trial. Accordingly, it is unlikely that the prosecutor's comment had any meaningful impact upon the jury. It is, therefore, plainly not a case of an egregiously improper argument by the prosecutor.

XIV

The petitioner alleges that he was denied the effective assistance of counsel in several respects.

Under the Sixth and Fourteenth Amendments to the Constitution, the petitioner was, of course, entitled to the effective assistance of counsel. Herring v. Estelle,

491 F.2d 125, 127 (5th Cir. 1974). This has been interpreted to mean not errorless counsel, but counsel reasonably likely to render and actually rendering effective assistance. Id. With respect to the application of this standard, the court stated in United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978):

> A review of the Fifth Circuit law indicates that this Court's methodology involves an inquiry into the actual performance of counsel in conducting the defense and a determination whether reasonably effective assistance was rendered based on the totality of the circumstances and the entire record. This Circuit does not blindly accept speculative and inconcrete claims of 'what might have been if.' If an appellant can point to specific examples of ineffectiveness, we have not hesitated to grant a new trial or hearing.

"A conviction will not be set aside on the ground of incompetent counsel, however, merely because an attorney may have erred on occasion when he rendered reasonably

effective assistance." United States v. Goldsmith, 483 F.2d 441, 443 (5th Cir. 1973).

The petitioner's claims of ineffective assistance of counsel are to be evaluated in light of these guidelines.

A. Failure to ask for a continuance after Dr. Crumbley's disclosure of the petitioner's admissions.

The petitioner contends that defense counsel failed to provide effective assistance of counsel when he did not seek a continuance after being advised by Dr. Crumbley of the petitioner's statements that the petitioner had killed "the coach" and had had the urge to kill. The petitioner contends that a continuance was necessary to permit counsel to explore the petitioner's competency to stand trial and to reevaluate whether the petitioner should testify. Since defense counsel had no need

to seek a continuance for either of these reasons, he plainly was not ineffective because he did not ask to have the trial continued.

1. At the evidentiary hearing, Rick B. Levinson, petitioner's trial counsel, testified that he had no concern that the petitioner was psychiatrically unfit for trial (H.T. 184).[14] Levinson stated that he had visited the petitioner at the jail at least once a week and "[h]e knew him to be lucid...and able to give...details about his life, not only prior to the time but at the time and after the time of the offense" (H.T. 176-177). Levinson also indicated

[14] An individual is competent to stand trial if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational and factual understanding of the proceedings against him. Bruce v. Estelle, 536 F.2d 1051, 1059 (5th Cir. 1976), cert. den. 429 U.S. 1053.

that he had talked to members of the petitioner's family, as well as to some of petitioner's acquaintances in Tampa, about the petitioner's medical background (id.) Levinson said that in light of his regular dealings with the petitioner, Dr. Crumbley's phone call did not raise any question about the petitioner's competence (H.T. 266).

The petitioner, substantially overstating the facts, attempts to suggest that he might have been incompetent at the time of the criminal proceedings. The petitioner, for example, asserts that he committed acts of self-mutilitation, if not suicidal acts, by slashing his wrists. The petitioner's medical record reflects that, in fact, he inflicted on two occasions superficial scratches on his wrists (H.T. 205-206). Further, the varying stories which the petitioner told his attorney

concerning the events of the night of the murder are more reasonably explained as a lack of trust, rather than the ramblings of an incompetent. And there is nothing in the fact that the petitioner was being given Mellaril, a tranquilizer, which would warrant the defense attorney in concluding, contrary to his lucid dealings with the petitioner, that the petitioner might be incompetent to stand trial. See United States v. Hayes, 589 F.2d 811, 823 (5th Cir. 1979).

Moreover, it must be remembered that the petitioner's claim is not that he was incompetent, but that his lawyer did not seek a continuance to determine whether he was incompetent. Viewed in this light, it is thus especially significant that the petitioner has failed to show that his lawyer was aware that the petitioner was receiving a drug or had scratched his wrists (H.T. 184,186).

Furthermore, the petitioner was examined as to competency by Drs. Sprehe and Coffer after the jury's recommendation and prior to sentencing. Both doctors expressed the opinion that the petitioner was competent at that time (I R.44, 46; IV R.544).[15]

Under these circumstances, there is no substance to the petitioner's contention that his lawyer failed to render reasonably effective assistance because he did not move for a continuance in order to have the petitioner examined as to his competence.

[15] The petitioner attached to one of his memoranda an affidavit of a psychiatrist, Joel Katz, who had examined the petitioner in March, 1979. Although Dr. Katz is of the opinion that certain alleged factors not considered by Dr. Sprehe would raise substantial questions as to the validity of Dr. Sprehe's conclusions, Dr. Katz does not express the opinion that the petitioner was incompetent at the time of trial, or that there is even a reasonable probability that he was incompetent at that time (Ex. A to Petitioner's Memorandum on Evidentiary Issues.)

2. Similarly without merit is the petitioner's contention that Levinson was not reasonably effective because he did not seek a continuance in order to reassess his trial strategy after receiving Dr. Crumbley's telephone call.

The premise for this argument is that the petitioner was going to explain Mary Bassett's testimony that she had overheard the petitioner say he had just killed a man as being simply an excuse for the petitioner to leave his wife. However, when Dr. Crumbley called with his information, it is argued, the petitioner could no longer testify, apparently because this might open the door to Dr. Crumbley's testimony. Therefore, according to the petitioner, a continuance was necessary to come up with another explanation for Mary Bassett's testimony.

The petitioner, however, does not contend that Dr. Crumbley's phone call provided Levinson with additional factual information which needed investigating. Nor does he suggest what different explanation of Mary Bassett's testimony would have been divined if Levinson had requested, and obtained, a continuance.

Levinson received the information from Dr. Crumbley on Sunday and the selection of the jury did not begin until Monday afternoon. In Levinson's view, he was ready for trial (H.T. 302) and Dr. Crumbley's information did not significantly affect his trial strategy (H.T. 252). In this regard, Levinson testified that, although prior to trial he considered that the petitioner might testify, his thought going into the trial was that the petitioner would not take the stand (H.T. 254).

In addition, a newspaper reporter present at a hearing on Monday had heard Dr. Crumbley's information, and Levinson wanted the trial to begin without delay because of his concern that newspaper publicity would prejudice the potential jurors (H.T. 269-270,301).

Under these circumstances there is simply no basis for a contention that Levinson was not reasonably effective because he failed to request a continuance after receiving Dr. Crumbley's phone call.

B. Failure to advise petitioner competently concerning plea negotiations.

The petitioner contends that Levinson failed to advise the petitioner adequately in connection with plea negotiations. The petitioner, however, has not shown that Levinson failed to provide reasonable assistance in connection with plea negotiations. Moreover, the petitioner's

claim is insufficient for the additional reason that, even if Levinson had been effective in advising the petitioner concerning a plea, there is no showing that the prosecutor would have agreed to any plea bargain.

1. The petitioner, citing cases involving claims of ineffective counseling where a guilty plea had been entered, argues that Levinson failed to provide effective assistance in not giving the petitioner a realistic assessment of the situation and in not strongly advising the entry of a guilty plea. In cases where a guilty plea has been entered, counsel's competence in advising about the plea is determined not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.

McMann v. Richardson, 397 U.S. 759, 771 (1970). The petitioner has failed to show that Levinson's handling of the matter of plea negotiations, under the circumstances of this case, was not within the range of competent actions.

Levinson testified that he engaged in plea negotiations with the prosecutor, indicating that they conducted one lengthy session, as well as one or two others that were not as long (H.T. 171). Levinson informed the petitioner of the substance of the discsussions (H.T. 172). He told the petitioner that he felt that there was a reasonable opportunity to obtain, in exchange for a guilty plea, a guarantee of a life sentence with a minimum of twenty-five years before being eligible for parole (id). The petitioner expressed "some reluctance" to accept any resolution of the matter that would require him to spend

twenty-five years in jail (H.T. 173). Moreover, Levinson and the petitioner had a conversation about whether the petitioner should plead guilty, if in fact, he was not guilty (H.T. 172). Significantly, although the petitioner told Levinson varying stories about the event, and either on the eve of trial or the morning of trial acknowledged his statements to Dr. Crumbley, he never admitted to Levinson that he had committed the murder (H.T. 331).

The petitioner asserts that Levinson believed that he had a fifty-fifty chance of acquittal and that such an assessment was "astonishingly naive." Levinson explained that what he meant by a fifty-fifty chance of acquittal was that the jury was "either going to believe Mary Bassett and the description given by Mrs. Medgebow or they were not; that's fifty-fifty" (H.T.

173-174). Thus, Levinson's view was not that the chance of acquittal could be quantified at fifty percent, but that acquittal depended upon whether the jury accepted the testimony of Mary Bassett and Mrs. Medgebow. This assessment is clearly accurate. It is also significant that Levinson did not believe that he told the petitioner that there was a fifty percent chance of a not guilty verdict (H.T. 173), and there was no evidence from the petitioner that Levinson did make such a statement.

The petitioner argues further that Levinson was remiss in not advising the petitioner concerning the probability of conviction. Much of petitioner's argument in this regard stems from Levinson's understandable inability to remember specific details of conversations conducted more than five years previously. Levinson

did testify, however, that he visited the petitioner in jail at least once a week and "talked with him at great length about the aspects of the case" (H.T. 176). Levinson told the petitioner during these conversations that there was a chance of being found not guilty (H.T. 173). Levinson was also of the view that if the petitioner was convicted then the likelihood of the death penalty being imposed was great. Although Levinson did not specifically testify that he told the petitioner that if convicted, the likelihood of the death penalty was great, it is appropriate to assume, in light of the numerous discussions between Levinson and the petitioner, that the petitioner was made aware of Levinson's views concerning the likelihood of the imposition of a death sentence. Significantly, the petitioner presented no testimony indicating that he was seriously

misled by Levinson's opinions or advice. Under all of these circumstances, the record fails to establish that Levinson was deficient in advising the petitioner as to his options and risks.

The petitioner contends also that Levinson was incompetent in not strongly advising the petitioner to plead guilty. Levinson indicated in his testimony that he did not advise the petitioner whether to accept an agreement of life imprisonment with a twenty-five year minimum sentence, stating "[t]hat really wasn't a decision for me to make" (H.T. 172).

The petitioner cites no authority holding that an attorney is incompetent if he fails to recommend that a guilty plea be entered and that, as a result, the defendant stands trial and is convicted. The cases cited by the petitioner, rather, involve the substantially different context

of a guilty plea which has been entered following a recommendation by the defendant's attorney. While attorneys in some of those cases have been found to have offered reasonably competent advice in recommending a plea of guilty, it does not follow from those cases that an attorney who makes no recommendation to plead guilty is not also reasonably competent.

Assuming, however, that an attorney may be incompetent in not making a recommendation to plead guilty in some circumstances, that cannot be said of Levinson in this case. Here, Levinson discussed the aspects of the case with the petitioner frequently and at length; he adequately advised the petitioner of the risks; and he engaged in plea negotiations and discussed with the petitioner the most favorable agreement which he thought could be obtained. The petitioner, furthermore, never admitted his

guilt to Levinson and expressed some reluctance to accept any offer which would require him to spend twenty-five years in prison. Under these circumstance, the lack of a recommendation to plead guilty does not place Levinson's actions outside the range of competence demanded from defense attorneys.

2. Moreover, the petitioner is not entitled to relief on his claim of ineffective plea negotiations for the additional reason that he has failed to show that any plea agreement would have been reached.

As indicated, the petitioner bases his ineffective plea negotiation argument upon cases dealing with claims that counsel had been ineffective in advising a plea of guilty. Of course, pleading guilty, and thus waiving important constitutional rights, is substantially different from

standing trial and asserting those rights. Nevertheless, an attorney may be incompetent in some circumstances where a defendant stands trial, rather than pleads guilty.[16]

Although an attorney may fail to provide effective assistance in some cases by having a client stand trial, a defendant must show more in those circumstances in order to obtain relief on grounds of ineffective counsel than is required of defendant who has pled guilty. Thus, it is not sufficient for a defendant who has stood trial to demonstrate simply that his lawyer did not advise him adequately or did not attempt to plea bargain. It must be shown, in addition, that in all probability

[16] It would seem, for example, that if an attorney received a favorable plea offer, and that offer was not communicated to the defendant, the attorney would not have rendered effective assistance of counsel.

the prosecution would have agreed to a plea bargain, that the court would have accepted the plea, and that the defendant would now accept the prosecutor's offer.

The appropriateness of this additional showing becomes clear when the question of relief is considered. It obviously makes no sense to say that a defendant who has stood trial is entitled to a new trial if his lawyer fails to conduct plea negotiations competently. Plainly, a defendant who is complaining that he should never have gone to trial in the first place should not be awarded a second trial if the claim is accepted that his lawyer was ineffective with regard to plea negotiations.

Furthermore, there is no authority for a court to impose a particular plea bargain upon a prosecutor. Thus, in cases such as petitioner's,a defendant must show that

the prosecution had offered a specific bargain or in all likelihood would have offered such a bargain. Otherwise, a defendant who has stood trial and been convicted could subsequently attempt to write his own favorable bargain, possibly with the aid of his lawyer who might eagerly agree that his actions concerning plea negotiations were ineffective.

Because there is no evidence in this case that the prosecutor would have accepted any plea agreement, the petitioner has not shown that he is entitled to relief on his claim of ineffective plea bargaining, even assuming, arguendo, that Levinson failed to provide reasonable assistance of counsel during plea negotiations. The only testimony adduced by the petitioner in this regard is the statement by Levinson that "I felt [the petitioner] had a reasonable opportunity to be afforded

the right to plead guilty for a guarantee of life and twenty-five, which meant he would have to serve twenty-five years prior to being paroled" (H.T. 172). This type of subjective feeling is wholly inadequate to establish that the plea agreement of "life and twenty-five" would ever have been reached. If this showing were sufficient a defendant would be foolish ever to plead guilty since he would easily have his trial and his bargain, too.[17]

For the foregoing reasons, the petitioner's claim of ineffective plea bargaining by his counsel is without merit.

C. Failure to investigate and present an adequate basis for the suppression of Mary Bassett's testimony.

[17] It is appropriate to note also that there is nothing in the record indicating that the petitioner is now willing to plead guilty in return for a guarantee of a life sentence with a minimum of twenty-five years before being eligible for parole.

The petitioner contends that he was denied the effective assistance of counsel in connection with the suppression of the testimony of Mary Bassett. Mary Bassett, who was living with the Proffitts in a house trailer at the time of the murder, testified that while in her bedroom she overheard the petitioner say that he had killed a man with a butcher knife. the petitioner asserts that Levinson did not provide an adequate factual showing in supporting his motion to suppress this critical testimony, and that if he had properly investigated the matter he would have discovered substantial evidence in support of the motion.

1. As indicated, the petitioner criticizes his trial attorney's handling of the motion to suppress, arguing that Levinson should have presented evidence in support of the motion. Although Levinson

could not remember specifically how the motion to suppress was presented, he stated that a factual basis was provided through live testimony, by depositions, or by stipulation (H.T. 196). Since there is no record of the introduction of either live testimony or the pertinent depositions, it would seem that if Levinson is correct that a factual presentation was made to the court, it must have been by an agreed statement of facts.

Levinson, however, did distinctly recall a hearing in chambers on the motion to suppress (H.T. 195-196). In addition, Levinson objected at trial to Mary Bassett's testimony concerning statements by the petitioner for the reasons stated in the pretrial motion, and the trial court responded: "Same ruling. Proceed" (III R.371). At the conclusion of Mary Bassett's testimony and in the absence of the jury, the court stated(III R.390-391):

> Let the record reflect that the motion filed prior to trial by defense counsel in behalf of the defendant, a motion for suppressing the testimony of Mary Bassett who is a witness for the State, is denied.

It thus appears that the trial court may have made a preliminary ruling on the motion to suppress, but did not finally deny it until after hearing Mary Bassett's testimony.

In any event no procedural prejudice accrued to the petitioner as a result of the manner in which Levinson presented the matter. Both the trial court and the Florida Supreme Court considered the merits of the motion based upon the trial record.

2. The petitioner contends, however, that Levinson failed to investigate adequately the circumstances surrounding Mary Bassett's overhearing of the Proffitt's conversaton and, if he had

properly investigated the matter, he would have been able to present a sufficient predicate to establish a privileged marital communication. Under Florida law, a privilege for a marital communication turns upon whether the husband and wife made the communication in confidence. Proffitt v. State, supra, 315 So.2d at 464-465. A communication is not privileged if the parties knew or should have known that it was being overheard. Id. The petitioner contends that testimony of Mrs. Proffitt, which was adduced at the evidentiary hearing, would have established the marital privilege if it had been presented to the trial court. However, Mrs. Proffitt's testimony at the habeas evidentiary hearing is not credible and, more significantly, it was not available to Levinson prior to trial.

At the habeas evidentiary hearing, Mrs. Proffitt testified that she had waited up for the petitioner on the night of the murder in the living room of her trailer and was upset or worried about him. (H.T. 41); that around 5:15 A.M. the petitioner arrived home (H.T. 41); that she asked him where he had been, but that he did not answer and went straight into their bedroom (H.T. 44,45); [18] that she followed him into the bedroom (H.T. 45); and that while in their bedroom a conversation was conducted in below normal conversational tones (H.T. 32). It is not reasonable to believe that, after a worried or upset Mrs. Proffitt had

[18] The door of the trailer was in the front side off of the living and dining area. There was a hallway extending from that area down the trailer and off the hallway were first, Mary Bassett's bedroom, then a bathroom, and then the Proffitts' bedroom. The bathroom between Mary Bassett's befroom and the Proffitts' bedroom was approximately five feet wide (H.T.51).

waited up for the return of her husband, she would conduct a conversation in a below normal tone if he refused to state where he had been and instead went right past her into their bedroom, announced that he had just murdered someone, and indicated that he was leaving her and the area. Similarly,it is hard to believe that an individual who has just committed murder, is hurriedly fleeing the State, and is being asked no doubt for an explanation by his excited wife, is going to be able to keep his voice below normal conversational tones. In short, Mrs. Proffitt's habeas testimony concerning the conversation on the night of the murder is not credible.[19]

[19] In addition to the inherent incredibility of the testimony, it is also inconsistent with Mrs. Proffitt's earlier statements. Thus, for example, on the day of the murder, Mrs. Proffitt gave a statement to the prosecutor relating her husband's statements of that morning(H.T.

More significantly, there is nothing in the record which indicates that Mrs. Proffit told Levinson prior to trial the same story that she told at the evidentiary hearing. When Levinson asked Mrs. Proffitt at her deposition on January 21, 1974,

64). However, when Levinson took her deposition six months later she indicated she could not remember anything her husband had said that morning (Pet. Ex. 1, pp. 29, 31). Now, after the passage of more than five and one-half years, she states she can remember parts of the conversation (H.T. 59).

Similarly, in the statement given to the prosecutor on the day of the murder, Mrs. Proffitt stated that her husband told her where he had been as he walked through the bedroom door (H.T. 66). At the evidentiary hearing she testified that they had no conversation until they were in the bedroom and the door was closed (H.T. 65-66).

In connection with Mrs. Proffitt's credibility, it is noteworthy that she acknowledged at the habeas evidentiary hearing that she loves the petitioner and would do whatever she could to help him (H.T. 58). This contrasts with her indication to Levinson prior to trial that she was not very happy with her lifestyle (H.T. 283). Moreover, she was most likely unhappy with her husband's precipitous departure. Mrs. Proffitt's apparent change of attitude may well account for her inconsistent statements.

about the events on the morning of the murder, Mrs. Proffitt, who was plainly being uncooperative, stated, "I can't remember what went on that morning" (Pet. Ex. 1, p. 29). Accordingly, Levinson cannot be faulted for not presenting Mrs. Proffitt's current testimony, since that appears to be a recent fabrication.[20]

[20] It is appropriate to note that Levinson seems to have done a fairly thorough job in investigating how Mary Bassett learned of the information concerning the stabbing. Thus, he explored, and eliminated, the possibility that Mrs. Bassett might have heard the details of the Medgebow murder either from the investigating police officers, or from radio or television newscasts (H.T. 303-305). He therefore concluded that Mrs. Bassett must have received her information either by overhearing Mr. Proffitt, or by being told by Mrs. Proffitt after the petitioner had departed (H.T. 306). Levinson had no basis to show that Mrs. Bassett had been told the conversation by Mrs. Proffitt, and had not overheard it. Mrs. Bassett stated in her deposition that she had heard the conversation and that Mrs. Proffitt had not told her anything about a murder or someone being knifed (Pet. Ex. 9, pp. 27,28-29, 33-36). Moreover, Levinson recalls that Mrs. Proffitt told him that she had not

For these reasons, the petitioner is not entitled to relief on his claim that his attorney did not render reasonably effective assistance of counsel in

repeated the substance of the conversation to Mrs. Bassett (H.T. 305). The petitioner challenges Levinson's testimony in this regard, pointing out that, contrary to Levinson's belief, Mrs. Proffitt did not indicate in her deposition that she had not told Mrs. Bassett the substance of the conversation. Nevertheless, although Levinson may not recall precisely when Mrs. Proffitt told him she had not discussed the conversation with Mrs. Bassett, his recollection that Mrs. Proffitt did deny to him that she had told Mrs. Bassett of the conversation is credible and should be accepted.

The petitioner contends that Levinson should have conducted a sound test in order to demonstrate that only loud noise would be audible from one bedroom to the other. Levinson considered a sound test, but decided not to pursue the idea because of the inability to recreate the conditions on the night of the murder, and because he had lived in a trailer all through law school and had some feeling for the acoustical quality of a trailer (H.T.340). It is also significant in this regard that Mary Bassett testified, contrary to Mrs. Proffitt's habeas testimony, that someone in one of the bedrooms could hear conversations taking place in the other bedroom (III R. 375).

connection with attempted suppression of Mary Bassett's testimony.

D. Failure to render effective assistance during the penalty phase.

The petitioner contends further that his attorney's representation during the penalty phase of the trial did not amount to the effective assistance of counsel required by the Sixth and Fourteenth Amendments. On this claim, the petitioner is entitled to relief.

The quality of the representation afforded during the penalty stage must be considered in the light of the Supreme Court's holding "that in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Gregg v. Georgia, supra, 428

U.S. at 189 n.38 (emphasis added). As the Court explained in Woodson v. North Carolina, 428 U.S. 280, 304 (1976):

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v. Dulles, 356 U.S., at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

See also Lockett v. Ohio, supra, 438 U.S. at 604-605. The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel. A substantial failure to offer such information plainly constitutes ineffective assistance of counsel.[21] See Mason v. Balcom, 531 F.2d 717, 724 (5th

[21] It might also be argued that a defense attorney's failure to present mitigating evidence in a capital case amounts to a violation of the Eighth Amendment, particularly where counsel is court-appointed. It could similarly be contended that in a capital case a trial court's failure to obtain relevant background information concerning a defendant through a presentence investigation, or otherwise, constitutes an Eighth Amendment violation. However, these arguments were not discerned among the nearly 200 pages of memoranda filed by the petitioner following the evidentiary hearing. In light of the fact that the petitioner is entitled to relief on his related Sixth Amendment claim, it is not necessary to determine whether he might be entitled to relief under the Eighth Amendment as well.

Cir. 1976); United States v. Pinkney, 551 F.2d 1241, 1248 (D.C. Cir. 1976).

In this case the evidence at the guilt stage shed virtually no light on the petitioner as an individual. Nevertheless, the petitioner's counsel presented no evidence of petitioner's character and personal history at the penalty stage. The failure to present such evidence was not the result of tactical considerations or the absence of such evidence. It was, rather, the product of defense counsel's incorrect assessment that he was limited to the statutory mitigating factors and, to some extent, a lack of preparation, although this may have been largely a consequence of his misperception of the

law.[22] Levinson testified that he went into the trial assuming that he could not put on any evidence in mitigation except as set forth in the statute (H.T. 220).[23]

[22] There is also an indication that Levinson failed to introduce mitigating evidence as a result of instructions from the petitioner because the petitioner did not want to spend twenty-five years in jail (H.T. 221). It is more likely that Levinson in this regard is confusing his client's disinterest in a plea bargain and the matter of adducing mitigating evidence. As the petitioner notes, Levinson did attempt to introduce mitigating evidence through Dr. Crumbley's testimony. Moreover, at the time of sentencing, Levinson argued against the death penalty. Accordingly, it does not appear that Levinson was operating under any instructions from the petitioner against seeking mitigation of the sentence.

[23] This was one of the first capital cases under the new Florida statute and, as indicated, Levinson construed the statute to limit mitigating evidence to the enumerated factors. However, Levinson filed a pre-trial motion to dismiss the indictment on the ground, inter alia, that the death penalty statute was unconstitutional because it did not permit consideration of all pertinent mitigating circumstances (I R.24-25). Levinson could have preserved this contention by offering

Levinson stated further that he did not engage in any separate and distinct preparation for the penalty phase, but prepared for that part of the trial in conjunction with his preparation of the case as a whole (H.T. 186). He also said that he had no strategy for the penalty stage, but that his approach to that stage was to depend upon what occurred during the guilt phase (H.T. 187). Since there was only a thirty-five minute recess between the first and second stages of the trial, Levinson had no additional opportunity to prepare for the sentencing hearing after

evidence of nonstatutory mitigating circumstances. The trial court, moreover, may have allowed the introduction of such evidence. In any event, it is clear, despite Levinson's view of the statute's import, that this case does not present a situation where an attorney could not have reasonably foreseen a subsequent development in the law (H.T. 188).

the guilty verdict was rendered (IV R.492, 493).

In response to the argument that Levinson improperly failed to present evidence of the petitioner's character, the respondent asserts that there was no mitigating character evidence which Levinson could have presented. This assertion is without foundation. The petitioner has submitted a written proffer of evidence which might have been presented at the penalty phase. Without necessarily accepting all the details in the proffer as true, that information indicates that Levinson could have, and should have, called relatives and fellow-workers to present testimony of the petitioner's character and personal history. In general, that testimony might have shown, for example, that the petitioner had no

significant history of violence;[24] that he had a respectable record as an employee; that he had a fairly stable home life; and that he had had a somewhat difficult childhood.

The petitioner contends further that not only should Levinson have presented this information at the sentencing hearing, he should have called petitioner's mother as a witness during the presentation. Levinson testified that he did not call the petitioner's mother because he could not think of any reason to do so except for "the possible sympathy that it might have evoked from the jury" (H.T. 272). Since, as Levinson recognized, the appearance of

[24] Mary Bassett stated in her deposition that the petitioner was a very gentle person, that she had never seen him hit anyone, and that she recalled one occasion when the petitioner was incapable of putting a half dead puppy out of its misery (Pet. Ex. 9, p. 44).

the petitioner's mother might have evoked sympathy from the jury, she should have been called as a witness to testify concerning her son's character and personal history.

The petitioner also criticizes his trial counsel's failure to explain the circumstances of his breaking and entering conviction. Although on its face the conviction might appear to be significant, the petitioner asserts that the facts of that case are that he was found inside a Stamford, Connecticut restaurant at 3:00 a.m. in an intoxicated condition eating a hot dog, and that no damage was done to the restaurant and no property removed. Since the respondent has not challenged this proffer, it is assumed to be a fair representation of what might have been presented at trial in explanation of the

conviction. Defense counsel should have made such a presentation.

It is also significant that no presentence investigation was conducted in his case (Pet. Ex. 5, p. 31, ex. D). Such an investigation was particularly warranted in light of the lack of information in the record concerning the petitioner's character and background. Indeed, at the evidentiary hearing Levinson acknowledged that he should have asked for one (H.T. 276).

The petitioner, in addition, attacks the brevity and generality of his trial counsel's remarks at the time of sentencing (see IV R.553-554). Even assuming that this deficiency might not be sufficient, standing alone, to warrant relief, it certainly adds weight to the petitioner's claim of ineffective assistance of counsel at the penalty phase.

The petitioner contends further that he received ineffective assistance of counsel not only as the result of the lack of presentation of character information, but also because of the use of Dr. Crumbley's testimony. That testimony was presented when defense counsel agreed to let the prosecution call Dr. Crumbley at the penalty phase with the hope that Dr. Crumbley's testimony might establish mitigating circumstances concerning the petitioner's mental capacity and emotional status. Dr. Crumbley was thus permitted to testify that the petitioner stated that on the night of the murder he had an "uncontrollable desire" to kill; that the tension and feeling could not be resisted; that he had ridden around until he found an open patio door, and had entered and killed Medgebow, a total stranger; and that similar feelings were beginning to build in

the cell where he was confined (IV R.498-500).

It was not necessary, however, to allow the introduction of these frightening statements in order to obtain evidence of psychiatric mitigating circumstances since other psychiatric opinions could have been obtained. Furthermore, because of Dr. Crumbley's lack of psychiatric credentials, his opinion as to whether the petitioner was laboring under emotional distress or a substantial mental impairment did not carry much force (IV R.502; Pet. Ex. 5, p. 14). It is therefore clear, as the petitioner contends, that if Levinson had desired to present evidence of the statutory mental and emotional mitigating factors, he should have employed a psychiatrist as part of the defense team, first, to give advice about undertaking such an argument, and then, if appropriate, to present such testimony.

Indeed, a substantial contention can be made that this failure alone constitutes ineffective assistance of counsel. United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976). In any event, at the very least, the use of Dr. Crumbley's testimony significantly increased the need to present humanizing information in order to counteract the dramatic impact of that testimony.

In sum, then, although information concerning the petitioner's character and background could have been presented at the sentencing hearing, through a presentence investigation, or by argument of counsel, no such information was adduced. As a result, the only view the jury and the judge had of the petitioner was the impersonal picture drawn by Dr. Crumbley of an obsessed killer. It seems evident that the death penalty is far more likely to be

imposed upon a defendant who is viewed impersonally than upon one whose personality and characteristics have been presented to the sentencing authority. Defense counsel, thus, was clearly deficient in his responsibilities to his client in permitting the petitioner to be sentenced without portraying him as an individual.

The lack of character and background information available here to the sentencing authority would be disturbing in the context of an ordinary felony case. In a capital case there can be no doubt that it is unacceptable. See Woodson v. North Carolina, surpa; Lockett v. Ohio, supra. Since defense counsel had the primary responsibility to develop and present such information, his failure to do so denied the petitioner the effective assistance of counsel.[25]

E. Failure to protect petitioner's rights at trial.

The petitioner also asserts that his trial counsel committed five significant trial errors during the guilt phase of the proceedings. It has been pointed out, however, that a defendant is not constitutionally entitled to errorless counsel. As long as the attorney is deemed, on consideration of the entire record, to have actually rendered

[25] The petitioner also contends that trial counsel should have objected to various matters relating to sentencing. Even if Levinson might have erred on one or more of these procedural matters, it does not follow that relief would be warranted since, as previously indicated, the petitioner is not entitled to errorless counsel. In light of the petitioner's entitlement to relief due to trial counsel's failures concerning the presentation of evidence, there is no reason to decide whether counsel erroneously failed to make certain objections, and if so, whether those failures constituted ineffective assistance of counsel.

reasonably effective assistance, a conviction will not be set aside merely because of an occasional error.

A reading of the transcript of the guilt phase leaves the clear impression that Levinson was rendering effective assistance of counsel during that stage of the proceedings. None of the matters asserted by the petitioner warrants a contrary conclusion.

First, the petitioner attacks the fact that during voir dire Levinson mentioned that the petitioner "has been in jail for awhile" (II R.126). Levinson mentioned this fact, along with the fact that the petitioner had been arrested, and that the State was alleging that the petitioner had committed the offense, in an attempt to seek assurance from the prospective jurors that they would not be influenced in any way by these matters (II R.125-126). This

is a reasonable approach which has been used by other attorneys, and certainly does not constitute ineffective assistance.

Second, the petitioner complains that Levinson did not object to testimony that the petitioner fought extradition. It has already been concluded, however, that it is doubtful whether the testimony was objectionable, and that, in any event, the evidence had little significance. See pp. 21-22, supra. Plainly the failure to object to its admission did not amount to ineffective assistance.

Third, the petitioner criticizes Levinson's failure to object to Mrs. Proffitt's testimony concerning her telephone call to the police following the petitioner's departure, and Levinson's failure to object to the prosecutor's comments on this testimony during closing argument. In Florida, the marital

communication privilege extends to conduct, see Kerlin v. State, supra, and thus Levinson might have attempted to assert that privilege by objecting to Mrs. Proffitt's testimony, and to the prosecutor's comments insofar as they implied that the petitioner had made admissions to his wife.

It is not clear, however, that the objections would have been successful. The prosecutor might have been able to show that the marital communication privilege was waived as to Mrs. Proffitt's telephone call to the police. Mary Bassett indicated in her deposition that she heard either Mr. or Mrs. Proffitt say that, after a period of waiting, the police were to be called (Pet. Ex. 9, p. 47). Accordingly, the prosecution, upon objection, could have attempted to show through Mrs. Proffitt or Mrs. Bassett, that the petitioner either

directed, or acquiesced in, Mrs. Proffitt calling the police.[26]

Furthermore, even if it is not clear whether the testimony and comment concerning the telephone call would have been admitted, there plainly was sufficient likelihood that an objection would be overruled for Levinson reasonably to decide that, as a tactical matter, he should minimize the significance of the telephone call by not objecting.

In any event, even if Levinson had no reasonable tactical basis for not objecting to the testimony and comments concerning the telephone call, any error in failing to

[26] Upon objection, the prosecutor could also have sought to establish Mrs. Proffitt's call through Mary Bassett (see Pet. Ex. 9, pp. 46-47), or the police officers. It is not clear that the Florida courts would have extended the marital communications privilege to exclude the testimony of these witnesses.

object does not constitute ineffective assistance of counsel. The implicit admission arising from Mrs. Proffitt's telephone call clearly pales beside the testimony of Mary Bassett. Accordingly, even if Levinson erred in not objecting to matters concerning the telephone call, that error would not transform a reasonably effective performance by counsel into an incompetent one.

Fourth, the petitioner complains of Levinson's failure to object on constitutional grounds to the instruction on flight. Since it has already been concluded that the instruction on flight was not constitutionally objectionable, (supra, p. 20), the petitioner's contention is without merit.

Finally, the petitioner asserts that Levinson was incompetent because he did not object to testimony that a murder warrant

for the petitioner was obtained, and that the police were looking for the petitioner and his car within a few minutes after the crime occurred. The testimony that the police were looking for the petitioner shortly after the crime was relevant to the question of the petitioner's flight.[27] An objection, moreover, might have increased the jury's focus upon the testimony. In any event, these were all secondary matters and a failure to make a valid objection to them would not amount to ineffective assistance of counsel.

XV.

The petitioner contends that the sentencing proceedings were

[27] The statement that a murder warrant was obtained is of doubtful relevance, although it may have a bearing on the question of flight insofar as it shows a basis for the extradition proceedings which the petitioner refused to waive. Its impact, if any, was negligible.

constitutionally defective because he was absent during the testimony of a court-appointed psychiatrist.

After the guilt and penalty stages of the petitioner's trial had been completed, and the jury had recommended death, the trial court, with the parties' consent, appointed two psychiatrists, Drs. Robert H. Coffer and Daniel J. Sprehe, to examine the petitioner (IV R.536). In a deposition given in connection with these habeas proceedings, the trial court explained that he appointed the psychiatrists because, although he "concurred with the recommendation of the Jury on the... sentence of death," he wanted to satisfy himself that a psychiatric mitigating circumstance was not present (Pet. Ex. 5, pp. 13, 31).

Pursuant to his appointment, Dr. Coffer conducted a psychiatric examination and

submitted a report (I R.46). On March 21, 1974, Dr. Coffer testified that, in his opinion, at the time of the murder, the petitioner was not under the influence of any extreme emotional or mental pressure, and that his ability to appreciate the criminality of his conduct and to conform to the requirements of law was not substantially impaired (IV R.545-546). The petitioner's attorney was present and cross-examined Dr. Goffer (IV R.546-550). The petitioner, however, was not in the courtroom during Dr. Coffer's testimony (IV R.542). Defense counsel expressly waived the petitioner's presence during that testimony (id.), but did so, it appears, without discussing the matter with the petitioner (H.T. 437, 447).

By virtue of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, a

defendant in a state criminal trial has a right to be present at all stages of the proceedings. Illinois v. Allen, 397 U.S. 337 (1970); Hopt v. Utah, 110 U.S. 574 (1884). This right, moreover, cannot be waived in a capital case by defense counsel without the defendant's authorization, if indeed the right can be waived at all. Bustamante v. Eyman, 456 F.2d 269, 274 (9th Cir. 1972). In this case, therefore, defense counsel's purported waiver of the petitioner's right to be present does not affect that right since it was made without consulting the petitioner. See United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. den. 394 U.S. 908.

A defendant's right to be present at all stages of the trial proceedings does not extend, however, to hearings, even evidentiary hearings, which are related to, but not an integral part of, the trial.

United States v. Howell, 514 F.2d 710 (5th Cir. 1975), cert. den. 423 U.S. 162 (in camera hearings on attempted bribe of juror); United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. den. 401 U.S. 925, 409 U.S. 894 (evidentiary hearing concerning wiretap); United States v. Lewis, 420 F.2d 686 (5th Cir. 1970) (hearing as to whether witness was being forced to commit perjury). It is therefore not clear whether the ad hoc proceeding at which Dr. Coffer testified is a stage of the trial that a defendant has a right to attend. Certainly the hearing was not part of the statutory trial and sentencing procedures. Nevertheless, in light of Gardner v. Florida, 430 U.S. 349 (1977), it would seem that, if information adduced at such a hearing has a bearing on a defendant's sentence in a capital case, the defendant has a right to be present in

order to respond to, or advise his counsel about, the matters discussed at the hearing. See Raulerson v. Florida, No. 79-267 CIV.J-WC (M.D. Fla. May 9, 1980), reh. den. (June 24, 1980).

The respondent contends, however, that any error which may have occurred is harmless, and for that for this reason the petitioner is not entitled to relief on this claim. The principle of harmless error has been applied to deny relief to violations of a defendant's constitutional right to be present at trial. Nevels v. Parratt, 596 F. 2d 344 (8th Cir. 1979); Bustamante v. Cardwell, 497 F. 2d 556 (9th Cir. 1974); United States v. Gradsky, supra, 434 F. 2d at 884. Under the circumstances of this case, the petitioner's absence during Dr. Coffer's testimony was harmless error beyond a reasonable doubt.

The petitioner had an opportunity at the penalty phase of the trial to present psychiatric mitigating circumstances, and in that regard relied solely upon the testimony of Dr. Crumbley. The trial judge after hearing that testimony, as well as all the other evidence introduced at the trial, was in agreement with the jury's recommendation of death. Nevertheless, because he was aware that Dr. Crumbley was not a lciensed psychiatrist (Pet. Ex. 5, pp. 14, 16), the trial judge, for his own satisfaction, appointed Drs. Coffer and Sprehe to examine the petitioner to see if any psychiatric mitigating factor existed which might change his mind about imposing the death penalty (id. at 17, 29, 30-31).

This case, therefore, does not involve a situation where the petitioner's presence was needed in order for him to assist counsel in rebutting any unfavorable

matters which Dr. Coffer might have stated. The trial judge had concluded prior to the appointment of Drs. Coffer and Sprehe that he was going to impose the death sentence absent the presentation of some mind-changing mitigating circumstances. And, even if Dr. Coffer's rather general report and testimony could be viewed as reflecting adversely on the defendant's character, Dr. Coffer's information had no effect upon the determination of the sentence.

It is significant, furthermore, that th petitioner does not point to any of Dr. Coffer's testimony which he could have assisted counsel in attacking. Thus, he asserts only that if he had been present he could have informed his counsel of the veracity of statements allegedly made to Dr. Coffer by the petitioner. However, in sharp contrast to the specificity with

which he supports his claim that he was denied the right to cross-examine Dr. Sprehe, the petitioner does not identify any statements made by Dr. Coffer which could have been meaningfully challenged.

Accordingly, the petitioner's absence during Dr. Coffer's testimony would have had some significance only if he might have been able to assist counsel to establish psychiatric mitigating circumstances. Such circumstances could not be demonstrated, however, by showing simply that the doctor's opinion was suspect, or even by having the doctor withdraw his opinion due to uncertainty. Rather, the petitioner, in order to establish mitigating circumstances through Dr. Coffer, would have to persuade Dr. Coffer to undergo a complete reversal of his opinion. The petitioner makes no attempt to demonstrate that he had information which, if he had been present,

he could have passed on to his lawyer in order to obtain a different opinion from Dr. Coffer. There is thus no reason whatever to think that the petitioner's presence might have resulted in Dr. Coffer opining that there were psychiatric mitigating circumstances.

In sum, because the trial court had already decided to impose the death sentence after the penalty phase of the trial, and appointed Dr. Coffer only to eliminate the possibility of psychiatric mitigating circumstances, the petitioner's sentence was not affected by any adverse testimony that went unrebutted due to his absence. Moreover, there is absolutely no basis to think that if the petitioner had been present, Dr. Coffer would have been cross-examined so successfully that he would have completely changed his opinion. For these reasons, a violation of

the defendant's constitutional right to be present during Dr. Coffer's testimony is harmless error beyond a reasonable doubt.

XVI.

The petitioner also argues that his constitutional rights were violated when his attorney was denied the opportunity to cross-examine Dr. Sprehe prior to sentencing concerning his report of the petitioner's psychiatric examination. This argument is without merit because the trial court did not consider Dr. Sprehe's report in imposing sentence.

As previously indicated, after the jury had recommended death, but before the court imposed sentence, Dr. Sprehe, along with Dr. Coffer, was appointed to conduct a psychiatric examination of the petitioner. Dr. Sprehe carried out the examination and submitted his report to the court, with a copy being sent to

petitioner's counsel (I R.44). Although Dr. Sprehe had been ordered to appear at a hearing on March 21, 1974, to testify concerning his report, he was not able to attend the hearing (IV R.543, 551). Defense counsel requested an opportunity to examine Dr. Sprehe concerning the report, and the court indicated that he would permit the doctor's testimony to be made a part of the record at a subsequent time (IV R.543). Nevertheless, the court then proceeded with the sentencing of the petitioner (IV R.552, 557).

The petitioner contends that Dr. Sprehe's report contained a number of adverse factual statements which were incorrect and which he was never given a chance to rebut. Gardner v. Florida, supra, establishes that a death sentence may not be imposed on the basis of

information which the defendant had no opportunity to deny or explain.

In this case, however, there is no Gardner v. Florida violation because the trial judge has made clear that he did not consider Dr. Sprehe's report in imposing the death sentence. After Gardner was decided, the Florida Supreme Court asked the trial judge in this case whether he imposed the death sentence on the basis of any information not known to the defendant (Pet. Ex. 5, Ex. C). The trial judge responded (Pet. Ex. 5, ex. D) (emphasis added):

> ...[I] did not impose the death sentence in said case on the basis of consideration of any information not known to the appellant.

> The Court did not consider a presentence investigation, juvenile case file information, psychiatric reports, or otherwise and further says that all information available to the Court prior to sentencing came in open court.

Although this response seems clear, the judge's deposition was authorized to eliminate any uncertainty concerning whether he had considered Dr. Sprehe's report in imposing sentence. At that deposition, the judge explained, as previously indicated, that he agreed with the jury's recommendation of death, but had appointed Dr. Sprehe and Dr. Coffer to eliminate the possibility of psychiatric mitigating circumstances (Pet. Ex. 5, p. 31). Because the doctors did not find any such mitigating factors, the doctors' reports were not considered further (Pet. Ex. 5, pp. 31-32). Specifically, with regard to Dr. Sprehe's report, the trial

judge stated that he did not consider that report in imposing sentence (Pet. Ex. 5, p. 29).

Under these circumstances, there was no Gardner v. Florida violation in this case.[28]

XVII.

The petitioner contends finally that he was denied the effective assistance of counsel on appeal because his court-appointed appellate lawyer failed to raise certain issues. This claim also does not warrant habeas relief.

The Fifth Circuit has held that on appeal, as at trial, a defendant is entitled to counsel reasonably likely to render and rendering reasonably effective

[28] The petitioner's related contention that his inability to examine Dr. Sprehe deprived him of an opportunity to present favorable evidence was rejected in Part II, supra, pp. 8-9.

assistance. Passmore v. Estelle, 594 F.2d 115 (5th Cir.), modified, 607 F.2d 662 (5th Cir. 1979). Accordingly, an inquiry is to be made into the actual performance of counsel not to determine whether he was errorless, but whether, based on the entire record, he rendered reasonably effective assistance. Id.

This case does not involve the failure to perfect an appeal, as do many cases dealing with ineffective assistance on appeal. Here the petitioner's appellate counsel presented eleven issues for review, and filed two substantial briefs in support of his contentions (Pet. Exs. 10, 11). The petitioner, rather, contends that his appellate lawyer was incompetent because he failed to raise certain specific issues.

The first such issue which the petitioner contends should have been raised is whether the trial court committed

reversible error in denying defense counsel an opportunity to cross-examine Dr. Sprehe. However, when viewed from appellate counsel's perspective, counsel could reasonably conclude that an appeal on that point was not warranted since it would not provide any relief. Thus, although appellate counsel was aware that the examination of Dr. Sprehe was not permitted, there was nothing in the record to suggest to him that the factual information contained in Dr. Sprehe's report was inaccurate, as petitioner now asserts it is. Nor was there any basis in the record for appellate counsel to think that Dr. Sprehe would be susceptible to changing his medical opinions upon cross-examination. Indeed, the fact that trial counsel did not avail himself of the opportunity to examine Dr. Sprehe upon the record following sentencing would indicate

to someone studying the record that there was really nothing to be established by examining Dr. Sprehe. It is particularly significant, furthermore, that a reversal for an error in denying the examination of Dr. Sprehe would not result in reopening the trial, but simply in a remand for his testimony, followed by a resentencing by the trial judge. Under these circumstances, appellate counsel could reasonably conclude that a successful attack on the trial court's failure to hear Dr. Sprehe's testimony would not result in any meaningful relief.

The petitioner argues further in this connection that an even more serious failing was that appellate counsel neglected to pursue any challenge to petitioner's sentence, based upon Dr. Sprehe's failure to testify, after the Florida Supreme Court's inquiry of the

trial court following the decision in Gardner v. Florida, supra. However, the trial judge responded to the Florida Supreme Court's question by expressly stating, inter alia, that he did not rely upon psychiatric reports in imposing the death sentence (Pet. Ex. 5, Ex. D). Thus, after the Florida Supreme Court's inquiry, there was even less reason for appellate counsel to challenge the lack of opportunity to examine Dr. Sprehe prior to sentencing.

Accordingly, the petitioner was not denied the effective assistance of counsel because his appellate attorney did not appeal the trial court's refusal to take

Dr. Sprehe's testimony prior to sentencing.[29]

Also without merit for similar reasons is the petitioner's claim that appellate counsel was ineffective because he failed to challenge the petitioner's absence during Dr. Coffer's testimony. Appellate counsel very reasonably could have concluded that nothing could be gained from appealing that point since it would only

[29] Moreover, any ineffectiveness of appellate counsel with respect to Dr. Sprehe's failure to testify would be harmless error beyond a reasonable doubt. See Passmore v. Estelle, supra, 607 F.2d at 664 (Coleman, C.J., concurring); Davis v. Alabama, 596 F.2d 1214, 1221-1223 (5th Cir. 1979). It was pointed out in Part XVI, supra, that because the trial court did not consider Dr. Sprehe's report in imposing sentence, the petitioner was not adversely affected by his inability to explain or rebut matters contained in Dr. Sprehe's report. Also, it was concluded in Part III B, supra, that Dr. Sprehe's testimony would not have been favorable to the petitioner, and that therefore the petitioner was not deprived of an opportunity, through Dr. Sprehe, to present favorable testimony.

result in obtaining a reprise of that testimony in the petitioner's presence and a resentencing by the trial court. Moreover, appellate counsel could also reasonably think that an argument based upon the petitioner's absence during Dr. Coffer's testimony would be viewed as harmless error for reasons similar to those set out in Part XV, supra. Accordingly, it cannot be said that appellate counsel was incompetent in failing to raise that contention on appeal.[30]

The petitioner also contends that appellate counsel was deficient in failing to appeal the trial court's limitation of the circumstances which could be presented

[30] Alternatively, even assuming, arguendo, that appellate counsel was not reasonably effective on this point, the claim should be denied because counsel's failing was harmless error beyond a reasonable doubt. See Part XV, supra.

in mitigation. However, as previously discussed, see Parts III A, XIV D, The presentation of non-statutory mitigating evidence was limited by trial counsel's narrow view of the statute, and not by the trial court's rulings. Since no non-statutory mitigating evidence was offered, appellate counsel could not have reasonably argued that the exclusion of such evidence was attributable to the trial court. Appellate counsel was therefore not ineffective because he did not argue that the trial court had erroneously excluded nonstatutory mitigating factors.

The petitioner complains that appellate counsel was ineffective in not challenging the failure of the instructions concerning flight to note that flight itself was insufficient to establish guilt and may be consistent with innocence. Appellate counsel did appeal the giving of the flight

instruction and not just on constitutional grounds, as petitioner suggests. The fact that he did not raise the point now suggested by the petitioner is understandable since no objection was made in the trial court to the language of the instruction. Accordingly, under Florida law, the petitioner could raise the contention only if the instruction constituted fundamental error. See Fla.R.Cr.P. 3.390(d); Castor v. State, 365 So.2d 701 (Fla. 1978). In light of all the court's instructions, it is doubtful that the flight instruction was deficient in the manner petitioner suggests, but even if it were, it was plainly not fundamental error. Thus, appellate counsel was not ineffective on the grounds asserted by petitioner in his handling of the flight instruction.

The petitioner also criticizes appellate counsel's failure to raise the contentions that proper warnings had not been given to the petitioner in connection with his examinations by Drs. Sprehe and Coffer, and that the death penalty statute unconstitutionally presumed aggravation from commission of the killing in the course of a felony. Since these claims have been found to be without legal merit, it follows that appellate counsel was not ineffective because he did not raise them on appeal.

Similarly without merit is the contention that appellate counsel was ineffective because he did not argue on appeal that it was error to admit evidence concerning the petitioner's invocation of his right to an extradition hearing. Because no objection was made to the evidence in the trial court, and the

admission of the evidence did not constitute fundamental error, see Parts XIII, XIV E, there was no basis for an appeal. O'Berry v. Wainwright, 300 So.2d 740 (Fla. App. 1974).

XVIII.

For the foregoing reasons, I recommend that the petitioner be denied relief on the claims challenging the validity of his conviction, but that he be granted relief from his sentence on his claim that he was denied his right to the effective assistance of counsel at the penalty stage of his trial. I further recommend that the State be given an opportunity to conduct within a reasonable time another sentencing hearing under the Florida death penalty statute, Fla. Stat. 921.141. If the State does not hold another sentencing hearing within a reasonable time, the State should be ordered to resentence the petitioner

under Fla. Stat. 775.082 to life imprisonment.

Respectfully submitted,

/S/ Thomas G. Wilson
THOMAS G. WILSON
UNITED STATES MAGISTRATE

DATED: July 8, 1980

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 79-655-Civ-T-H

CHARLES WILLIAM PROFFITT, *

Petitioner, *

vs. *

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, *

Respondent. *

MEMORANDUM OPINION

From its beginning in the state system this case is now seven years old and will probably be that much older before it is finally resolved. The Petitioner, a state prisoner under sentence of death for murder, has presently brought the case to this Court seeking habeas corpus relief pursuant to 28 USC §2254. The following is a chronology of the significant events to date:

July 10, 1973 Murder of Joel

Ronnie Medgebow

August 1, 1973	Indictment of the Petitioner, Charles William Proffitt
March 11, 1974	Trial Begins
March 13, 1974	Verdict of Guilty
March 13, 1974	Jury Recommends Sentence of Death
March 21, 1974	Judgment of Guilt Entered on Verdict
March 25, 1974	Trial Judge's Written Findings and Sentence of Death
May 28, 1975	Decision and Opinion of the Supreme Court of Florida - Affirmed (315 So.2d 461)
August 13, 1975	Rehearing Denied
January 22, 1976	Certiorari Granted by the Supreme Court of the United States (423 U.S. 1082, 96 S.Ct. 1090)
July 2, 1976	Decision and Opinion of the Supreme Court of the United States Affirmed (428 U.S. 242, 96 S.Ct. 2960)
October 4, 1976	Rehearing Denied (429 U.S. 875, 97 S.Ct. 198)

March 29, 1977	Executive Clemency Hearing - Governor and Cabinet of Florida
September 19,1977	Trial Court Denies a Florida Rule 3.850 Motion to Vacate
June 29, 1978	Supreme Court of Florida Affirms Denial of the Motion to Vacate (360 So.2d 771)
October 20, 1978	Supreme Court of the United States Denies Certiorari (99 S.Ct. 294)
May 8, 1979	Second Executive Clemency Hearing - Governor and Cabinet of Florida
June 19, 1979	Governor of Florida Issues Death Warrant (Execution scheduled for June 27, 1979, at 7:00 A.M. E.D.T.)
June 21, 1979	Petition for Writ of Habeas Corpus Filed in this Court
June 25, 1979	Supreme Court of Florida Affirms Denial of Second Motion to Vacate (372 So.2d 1111)
June 25, 1979	Hearing Held Before

	Me On Application for Stay
June 26, 1979	Stay Order Entered
September 25-56, 1979	Evidentiary Hearing Conducted by Magistrate
July 7, 1980	Magistrate's Report and Recommendation

The Magistrate's Report and Recommendation, fifty pages in length, is an exhaustive and meticulous evaluation of the Petitioner's equally exhaustive claims of constitutional error. The Magistrate has carefully weighed and rejected all of those claims but one. The Respondent and the Petitioner have each filed objections to the Magistrate's Report, and I have examined the entire file including, of course, the transcript of the evidentiary hearing conducted by the Magistrate in order to make the required de novo determination. See Rule 6.02, M.D. Fla. Rules,

28 USC §636(b)(1)(B) and (C), Rule 8(b)(4), Rules Governing §2254 Cases. The issues have been thoroughly briefed* and the case is ready for decision.

I

The Magistrate determined that the Petitioner received ineffective assistance of counsel during the penalty phase of his trial in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. He recommended, therefore, that the writ issue commanding the State to conduct another sentencing proceeding within a reasonable time. In all other respects the Magistrate recommended that the Petitioner's claims be rejected and that his conviction be left undisturbed; and, in that regard, upon careful

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*The Petitioner's brief in opposition to the Magistrate's Report is seventy pages in length.

review of the Report in conjunction with the entire file, I am persuaded that the Magistrate was correct in every particular. No useful purpose would be served by adding to the record. To the extent that the Magistrate has recommended rejection of Petitioner's claims, his Report and Recommendation is approved, affirmed and adopted as a part of this Order.

Conversely, I am also persuaded that the Magistrate was mistaken in his conclusion that Petitioner's counsel rendered assistance which fell below the constitutional minimum. Obviously, however, given the Magistrate's recommendation, that is the most serious of the Petitioner's many claims and it must be examined in detail.

As a predicate to analyzing the Magistrate's conclusion it is appropriate

to develop the current state of the law not only with respect to the Sixth Amendment right to the assistance of counsel, but also the Eighth Amendment prohibition of cruel and unusual punishment as applied to capital cases. This is necessary because, in my view, the Magistrate tended to mix and confuse those constitutional concepts; and, with respect to the Sixth Amendment claim in particular, he also tended in his detailed analysis of the issue to lose sight of the general principles governing the evaluation of a lawyer's performance.

II

The earlier decision of the Supreme Court of the United States affirming Petitioner's conviction and sentence was one of a quintet of Eighth Amendment capital punishment cases decided by the Court on

the same day (July 2, 1976) in the wake of its 1972 decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). The quintet consisted of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976); and Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001 (1976). In those cases four Justices took the position that all five statutes complied with the constitution. Two Justices took the position that none of them complied. Hence, the disposition of each case varied according to the votes of a plurality of three Justices who delivered a joint opinion in each case upholding the post-Furman statutes of Georgia, Florida and Texas, but condemning those

of North Carolina and Louisiana. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2963 (1978). The essence of the plurality view was that the due process clause of the Fourteenth Amendment, embracing the Eighth Amendment prohibition of cruel and unusual punishment, necessarily contemplates an application of structured sentencing standards to be followed as a guide by the sentencing authority in a manner which "requires consideration of the character and record of the individual offender and the circumstances of the particular offense . . ." Woodson v. North Carolina, 428 U.S. at 304, 96 S.Ct. at 2991.* Accordingly, the mandatory death sentence statutes enacted in North Carolina and Louisiana were invalidated, and the

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*See also, Gregg v. Georgia, 428 U.S. at 189, 96 S.Ct. at 2933, n.38.

statutes of Georgia, Florida and Texas were upheld because each of them preserved the exercise of rational discretion through structured or guided, individual consideration of each case according to the presence or absence of explicitly defined aggravating circumstances. Indeed, the Florida statute (Section 942.141), favorably patterned after the Modern Penal Code, also contained an enumeration of mitigating circumstances which must be considered in conjunction with the listed aggravating circumstances* See Proffitt

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*It has since been decided in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978) that the sentencing authority in most capital punishment cases must not be precluded from considering mitigating information whether within or beyond a statutory enumeration. This result was foreshadowed, however, by the decision in Proffitt. Id. at 2965-2966.

v. Florida, 428 U.S. at 248-249, 96 S.Ct. at 2964-2965, and Gregg v. Georgia, 428 U.S. at 193-194, 96 S.Ct. at 2935, n. 44.

Pointing to these Eighth Amendment principles relating to the testing of capital punishment statutes, the Magistrate found a Sixth Amendment violation concerning the ineffectiveness of counsel in developing mitigating evidence during the penalty phase of Petitioner's trial.

III

The Sixth Amendment says that "In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defence," and it was decided in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932), with particular reference to capital cases, that this assurance contemplates "effective" counsel.**

**Powell also held that this Sixth Amendment guarantee was obligatory upon the

The seminal authority on this point in the Fifth Circuit is MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960):

> "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

See also, e.g., Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974); United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978); and Lovett v. Florida, __F.2d __, No. 79-2304, October 8, 1980, Slip Op. p. 208.

The problematical question is: By what standard does one measure the performance of counsel? What is effective (or ineffective) assistance? There is simply no objective test.*

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states in capital cases through the due process clause of the Fourteenth Amendment.

*The problem is reminiscent of the dif-

We are taught only that a few errors or mistakes do not amount to ineffective assistance of constitutional significance because, after all, even the best lawyers make mistakes; and we are cautioned against the danger of judging by hindsight.** We are also admonished to avoid fragmentary flyspecking and to determine whether "reasonably effective assistance was rendered based on the totality of the circumstances and the entire record." United States v. Gray, supra, 565 F.2d at 887.

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*cont. ficulty presented by the obsenity cases prompting Mr. Justice Stewart to remark that a definition might be impossible "But I know it when I see it. . ." Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683 (1964) (concurring opinion).

**The State cites Homer's Illiad XVII for the axiom that "After the event even a fool is wise."

IV

The Petitioner's court appointed counsel, an assistant public defender, elected not to call any witnesses during the penalty stage of Petitioner's trial and, in fact, consented to the state's introduction of testimony by a physician (to whom the Petitioner had made damaging admissions) although counsel had successfully argued for the exclusion of that testimony during the trial on the issue of guilt.* Those circumstances, coupled with the absence of a formal presentence

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*The hearing conducted by the trial court concerning the admission of the physician's testimony during the guilt phase of the trial was held in chambers and was not reported; but it seems clear from the record as a whole that defense counsel successfully urged a psychiatrist-patient privilege as grounds for excluding the testimony at that time. See Florida Statute 90.242 (1973), in effect at the time of the trial.

investigation report, the lack of elaboration concerning the Petitioner's prior conviction for breaking and entering, and the brevity of counsel's allocution, were the focal points of the Magistrate's conclusion that Petitioner received ineffective assistance.

A. The Lack of Witnesses. The Magistrate found that the election not to call witnesses to testify about the Petitioner's character and personal history during the penalty stage ". . . was not the result of tactical considerations or the absence of such evidence. It was, rather, the product of defense counsel's incorrect assessment that he was limited to the statutory mitigating factors and, to some extent, a lack of preparation. . ." Report and Recommendation, p. 35.

In considering this aspect of the

case it must be remembered that Furman v. Georgia was decided June 29, 1972, less than two years before the trial; and the new Florida death penalty statute under which the Petitioner was sentenced had become effective as recently as December 8, 1972. (Ch. 72-724, Laws of Florida). In Lockett v. Ohio, supra, 438 U.S. at 599-600, 98 S.Ct. at 2962-63 (1978), the Supreme Court aptly observed:

> "Predictably, the variety of opinions supporting the judgment in Furman engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment. Some States responded to what was thought to be the command of Furman by adopting mandatory death penalties for a limited category of specific crimes thus eliminating all discretion from the sentencing process in capital cases. Other States attempted to continue the practice of individually assessing the culpability of each individual defendant convicted of a capital offense and, at the same time, to comply with Furman, by

> providing standards to guide the sentencing decision."

Under those circumstances, therefore, it is quite understandable that defense counsel at that point in time was under the impression that evidence in mitigation might well be limited to the specific circumstances enumerated in the statute. He testified before the Magistrate to that effect (H.T. 190):* and, indeed, in a comprehensive pretrial motion to dismiss the indictment counsel included as one of the grounds of his motion a contention that the statute was unconstitutional if construed to prohibit consideration of other mitigating factors. (R.21-25, paragraphs 15 and 16). See Spinkellink v. Wainwright, 578 F.2d 582, at 620-621 (5th

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*As in the Magistrate's Report and Recommendation, "H.T." refers to the two volume transcript of the evidentiary hearing conducted before him, and "R" refers to the multi-volume record on appeal from Petitioner's trial.

Cir. 1978).

The point is that counsel's misapprehension of the law can only be characterized as a misapprehension through hindsight which has the advantage of Lockett v. Ohio decided four years later. See McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441 (1970); Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1458 (1970); and Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977). In any event, it is far too much to say that counsel's election not to call any witnesses during the penalty phase was attributable to a mistake of law or insufficient preparation rather than tactical considerations or the lack of such evidence.

With respect to the matter of factual or background preparation, counsel deposed the state's witnesses and met with the Petitioner at least once a week for lengthy

discussions about the case (H.T. 176; 303-309); he had the assistance of an investigator (H.T. 177; 216) and he talked to witnesses in Tampa who knew and worked with the Petitioner (H.T. 177). Most significantly, counsel personally traveled to Connecticut (H.T. 294; 298-299) to take depositions and interview every member of Petitioner's family he could find in order to determine something about Petitioner's background from a medical, social and economic standpoint (H.T. 177;217); and, shortly prior to trial, he deliberately amended or supplemented his witness list by adding the names of Petitioner's mother and sister (R.29) for the specific purpose of retaining the option of later calling them as witnesses during the penalty stage of the trial (H.T. 217-218).

Moreover, with respect to tactical considerations, contrary to the Magistrate's

conclusion, the evidence is clear that a conscious decision was made not to call those witnesses during the penalty stage for a variety of tactical reasons. For example, counsel decided not to call Petitioner's sister as a mitigating witness because she had a criminal record (H.T. 271; 298); Petitioner's half brother, a police officer in Connecticut, was not called because he and the Petitioner "had not had a relationship for quite sometime" (H.T. 299); Petitioner's mother was not called because, apparently, she had been unable due to illness to travel from Connecticut for the trial (H.T. 297), the Petitioner did not want to get his family involved (H.T.97-98; 277), and Counsel's assessment was that she had nothing of substance to contribute in any event (H. T. 272). Petitioner's wife was not called because, as counsel testified (H.T. 283):

"A Well, he left her once for a couple of months, he had a tendency to drink, she was not very happy at that particular time with her lifestyle. The totality of the circumstances were such I did not feel she would be a good witness for us on second stage, and I suppose I was somewhat concerned, having reached that point, what that might do in terms of the husband and wife privilege."*

B. The Testimony of the Physician.

Before the trial commenced the Petitioner had asked to see Dr. James Crumbley, Jr., a medical doctor employed by the Hillsborough County Sheriff as a diagnostic consultant rendering services for the

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*It is noteworthy that Petitioner's wife is the person who initially called the police and centered investigative attention upon him (R. 328). Also, the reference in the testimony to "the husband and wife privilege" relates to the fact that when Petitioner's wife had been called as a witness by the state during the guilt phase of the trial counsel raised the marital privilege against revelation of any of her conversations with the Petitioner on the night of the crime (R.327).

benefit of the inmates at the Hillsborough County Jail (R.393). He also rendered psychiatric services based upon his training and experience in that field although he was not a practicing psychiatrist (R. 390). In their conversations the Petitioner admitted that he had killed "the coach,"** that he had an urge to kill, and that he was concerned because he expected to be acquitted and would kill again.

As previously noted, defense counsel successfully prevented the prosecution's use of the doctor's testimony during the guilt stage of the trial. During the penalty stage, however, he expressly waived his earlier objection (R.497) and permitted the doctor to testify. He had a cogent reason for doing so. The

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**Joel Ronnie Medgebow was a high school wrestling coach.

Petitioner had already been found guilty at that point in the proceeding and counsel expected to develop on cross examination the existence of two of the statutory mitigating circumstances (H.T. 299-300), namely, that the Petitioner acted "under the influence of extreme mental or emotional disturbance" (Florida Statute 921.141(6)(b)), and that "the capacity of the defendant. . .to conform his conduct to the requirements of the law was substantially impaired" (Florida Statute 921.141(6)(f)). Counsel's cross examination of the doctor on these points at the trial was as follows (R. 501-505):

"BY MR. LEVINSON:

"Q Doctor, would you explain to the jury your background in the field of psychiatry, specifying the amount of education you had in that area and whether or not you are qualified to act as a psychiatrist?

"A I had junior internship in psychiatry at the University Hospital, Augusta, Georgia. Some residency training in psychiatry at the Medical College of Virginia, in Richmond. I was assigned to the Oliver General Hospital in Augusta, Georgia, for a year where I was chief of neurology and psychiatry for the Army.

"Q So, you have had quite a bit of experience in the field of psychiatry?

"A Yes. On my army records, I am Board eligible on psychiatry.

"Q Doctor, when you examined, or discussed with the defendant the things that you have just related to the jury, were you acting as a psychiatrist?

"A Yes, I was.

"Q Did you feel that the defendant needed psychiatric help?

"A I did.

"Q Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has just been found guilty while under the influence of extreme emotional duress?

* * *

"THE WITNESS: I am able to so state.

"Q What is that opinion?

"A I am certain that this individual was under an intense amount of uncontrollable emotional stress.

"Q So that in fact what he did in the Medgebow home he couldn't help? Is that a layman's way of stating what you just stated?

"A Yes.

"Q Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has been found guilty while under an extreme mental disturbance?

"A Yes.

"Q Now, Doctor, is it fair to say that the defendant came to you as a psychiatrist, looking for help?

"A Yes.

"Q And that he in fact recognized, at least after the fact, that he needed psychiatric treatment and was coming to you for that purpose?

"A That is correct.

"Q Is a condition such as the defendant's a condition that can be treated?

"A Yes.

"Q If treated, would the defendant still be a danger to society or to fellow inmates?

"A He would not.

"Q Doctor, is it not true that there are confinement facilities which specialize or deal in the treatment of people with the emotional disturbance that the defendant apparently has?

"A That is correct.

"Q And that when one is confined in one of these facilities the individuals in charge of the facility hopefully know how to handle the situation?

"A That's correct.

"Q And they would work and attempt to cure the individual in question?

"A Correct.

"Q Doctor, do you have an opinion as to whether or not the defendant could conform his conduct to the requirements of law, at the time he committed the offense, or whether his ability to do that was substantially impaired?

"A I'm certain that at the moment and at the time that this occurred this individual was overwhelmed with the force over which he had no control and to which he must carry

out the deed.

"Q So that he was unable to conform his conduct to the requirements of law?

"A That is correct.

MR. LEVINSON: I have no further questions."

Moreover, during the hearing before the Magistrate counsel elaborated upon his reasoning and his purposes at the time in a most telling way (H.T. 263-264):

"Q Did you believe that [the testimony of Dr. Crumbley] was going to be convincing to the jury in this case?

* * * *

"A I didn't waive the privilege for that reason.

"Q You did not waive the privilege because you thought the jury would believe it; is that right?

"A I did not allow the introduction of that evidence [during the guilt stage of the trial] because I was concerned about the believeability of the evidence on the part of the jury.

"Q I don't understand your answer.

> "A Well, the jury decision [at the end of the penalty stage] is a mere recommendation to the trial court. And the trial court is the deciding body on whether or not the aggravating and mitigating circumstances exist.
>
> "It was my hope that Judge Burnside would be able to cut through the emotional impact of that information, recognize it as a mitigating circumstance, and rule in accordance with that recognition."

The Magistrate concluded, nevertheless, that it was not necessary to allow the introduction of Dr. Crumbley's testimony concerning the Petitioner's "frightening" statements in order to obtain evidence of psychiatric mitigating circumstances since other psychiatric opinions could have been obtained. (Report and Recommendation, p. 38). Quite apart from "second guessing" the rational decisions of counsel, however, the Magistrate's reasoning is further flawed on this point because it presupposes the contemporary availability of

such testimony from other qualified sources. The fact is that two other practicing psychiatrists subsequently appointed by the trial judge failed to support Dr. Crumbley's view concerning the mitigating circumstances about which he testified (R.545-546; H.T. 114). Defense counsel used what he had, and it may well have been all he could get.

C. The Petitioner's Prior Conviction. In Connecticut in 1967 the Petitioner plead guilty and was convicted of an offense described as "Breaking and Entering Without Permission." During the penalty phase of the trial the prosecution offered, and the court received in evidence, a certified copy of the judgment of conviction (R.494). No testimony was offered by the state or by the defense to further explain the details of that crime.

In point of fact, no testimony or evidence has yet been received, even before

the Magistrate in this case, concerning the circumstances surrounding that offense. Rather, in a narrative written proffer filed by the Petitioner after the evidentiary hearing it is asserted that he was discovered inside a Stamford, Connecticut restaurant at 3:00 a.m. in an intoxicated condition eating a hotdog, and that no damage was done to the restaurant and no property had been removed. Accepting that proffer,* the Magistrate ruled that defense

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*In its objections to the Magistrate's Report and Recommendation the state has vehemently complained of any reliance being placed upon Petitioner's "proffer" at least in the absence of an opportunity to cross examine or rebut. The proffer is unsworn and, indeed, is qualified by the following statement: "Petitioner's counsel represents to the Court that the above-described profer is based wholly on the conversations petitioner's counsel has had with the witnesses listed and accurately reflects the words and sentiments of the potential witnesses."

A proffer, by definition, is not evidence, and the state's objection to the Magistrate's reliance upon it is well taken. It is not necessary, however, to pursue the matter.

counsel should have made such a presentation at the trial. In making that ruling, however, it is my view that the Magistrate mistakenly accepted "speculative and inconcrete claims of 'what might have been if.'" United States v. Gray, supra, 565 F.2d at 887.

The 1967 judgment of conviction was admitted without fanfare or flourish. No witness was called by the state even to identify or explain it; and, in his closing argument to the jury, the prosecutor did not argue that the prior conviction was germane to any of the statutory aggravating circumstances (R.597). Rather, he urged the conviction -- in one sentence of argument (R. 599) -- only as a negation of one of the statutory mitigating circumstances, i.e., the lack of significant history of prior criminal

activity (Florida Statute 921.141(6)(a)).*

The matter of Petitioner's prior conviction was a low profile subject which, in terms of Petitioner's best interests at that time, might well have been handled by his counsel with utmost skill in choosing to leave it that way. Indeed, if retrospective speculation was a permissible exercise in evaluating the performance of counsel, I would reach the opposite conclusion from that now urged by the Petitioner and accepted by the Magistrate. For example, if the earlier conviction had been made a factual issue it would have given the state an opportunity to pursue and emphasize the similarities

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*Similarly, the trial judge in his subsequent findings concerning the sentence (R.57-59) did not mention the prior conviction in his discussion of the aggravating circumstances, and referred to it only as one of the factors tending to negate the corresponding mitigating circumstance.

between the 1967 offense and the facts surrounding the Medgebow murder. Both involved drinking; both involved a breaking and entering; both occurred during the predawn hours. Is that a repetitious pattern, a modus operandi? What are the possibilities that an effort to explain the 1967 offense might have led to evidence of other arrests or even other convictions? Dr. Sprehe testified, for example, during the evidentiary hearing before the Magistrate, that the Petitioner had told him about numerous prior arrests for car thefts, breaking and entering offenses, two assaults and one assault and battery (H.T. 110-111).**

**It does not appear that any Florida Court has yet decided whether the statutory phrase "significant history of prior criminal activity" would justify the reception of evidence concerning prior arrests, as distinguished from convictions; but that uncertainty alone should give cautious counsel pause to reflect before opening the door to the subject of criminal history.

D. The Lack of Presentence Investigation Report. The trial judge did not order a presentence investigation report before imposing sentence, and defense counsel did not request that he do so.

During the evidentiary hearing before the Magistrate defense counsel testified (H.T. 275-276):

"Q Do you believe there was a pre-sentence investigation.?

"A Should have been.

"Q If there was not one, should you have asked for one?

"A Should have been automatic.

"Q Why would it be automatic?

"A Well, let me put it this way, I know it's automatic now unless waived by statutory authority. Whether that statute was in effect at the time of Proffitt's trial, I can't tell you. But I do recall a pre-sentence investigation being run.

"Q Did you recall that there was a pre-sentence investigation?

"A I think so.

"Q And if there hadn't been one, should you have asked for one?

* * * * *

"A If there were such things as pre-sentence investigations then, and I think there were, I should have asked for one."

Citing that testimony (which was given from unaided memory more than five years after the trial) the Magistrate found that counsel's failure to demand a presentence investigation report was another significant aspect of his ineffective assistance (Report and Recommendation, p.37).

In examining this issue it is noteworthy that counsel in his testimony talked about "now" as distinguished from "then." Prior to February, 1973, the governing Florida law concerning presentence investigation reports in criminal cases was embodied in Rule 3.790, Florida Rules of Criminal Procedure, adopted March 1, 1967,

effective January 1, 1968 (196 So.2d 124), amended effective October 1, 1968 (211 So.2d 203); further amended effective December 13, 1971 (253 So.2d 421). The rule provided that "in cases in which probation is authorized by law . . . the court may refer the case to the state probation and parole commission . . . for investigation and recommendation . . ." On its face, therefore, the rule had no application to capital felonies as to which probation was not (nor is it now) a sentencing alternative. In 1972, effective February 1, 1973, the Supreme Court of Florida completely revised its Rules of Criminal Procedure, and the governing law concerning presentence investigation reports was then embodied in Rule 3.710 (34 F.S.A.). In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972).

Rule 3.710, in effect at the time of Petitioner's trial in March, 1974, together with its appended committee notes, provides as follows (34 F.S.A. 273):

"Rule 3.710. Presentence Report

"In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge.

"Committee Notes

"1972 Adoption. The rule provides for the utilization of a presentence report as part of the sentencing process. While use of the report is discretionary in all cases, it is mandatory in two instances, the sentencing of a first felony offender and of a defendant under 18 years of age. Of course, no report is necessary where the specific sentence is mandatory, e.g., the sentence of death or life imprisonment in a verdict of first degree murder." (Emphasis supplied).

The point is that at the time of Petitioner's trial in 1974, both historical as well as contemporary legal opinion and authority was to the effect that presentence investigation reports were not customary or necessary in capital cases; and, in fact, there was a serious question at the time that the use of a presentence report might even be error. That was, after all, precisely the argument made to the Supreme Court of Florida in Songer and Swan which were not decided until the year

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*cont. S.Ct. at 2966, n.9. Also with respect to current Florida law pertaining to presentence investigation reports (the "now" counsel obviously had in mind during his testimony before the Magistrate), see Florida Statute 921.231 (1979), and compare Huntley v. State, 339 So.2d 194 (Fla. 1976).

following Petitioner's trial.**

E. The Brevity of Allocution. At the sentencing proceeding before the trial judge defense counsel, in effect, committed his client to the conscience of the court and elected not to make an elaborate or prolonged appeal in allocution (R. 553-554). Subsequently, following an equally brief argument made by the prosecutor, defense counsel responded with additional remarks to the Court emphasizing "an

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**The state makes the provocative argument that, given the uncertain posture of the law at the time, if counsel had insisted upon a presentence report and if that report had contained any unfavorable information (such as that recited in Dr. Sprehe's testimony before the Magistrate), counsel would now be accused of incompetence for having pursued that course. The state also points out, in a similar vein, that the entire claim concerning the lack of a presentence report presupposes that such a report would have been favorable -- a speculative supposition at best.

obligation to humanity." (R.555-556).*

Thus, while the remarks of counsel at the instant of the sentencing were brief, it must also be remembered that, given the bifurcated nature of the proceeding, counsel had earlier made a more extensive argument to the jury and to the court with specific reference to the sentence as distinguished from the issue of guilt (R.517-529).

There was no constitutional shortfall with respect to allocution; and, on this point at least, the Magistrate did not conclude that there had been. He remarked only that the "deficiency" added weight to the claim of ineffective assistance in general. (Report and Recommendation,p.38).

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*The Magistrate did not cite (and may have overlooked) these additional statements by counsel. See Report and Recommendation, p. 38.

V

The Petitioner lost his case and was found guilty at his trial. He was unsuccessful in attempting to persuade the jury and the judge that the existence of mitigating circumstances justified a sentence of life imprisonment rather than death. He lost his direct appeal (during which he was represented by new counsel). Although certiorari was granted to review the case, he lost in the Supreme Court of the United States (despite the aid of still another lawyer). He lost his bid for clemency, presented to two different Governors; and, at the eleventh hour following issuance of the Death Warrant, he repaired simultaneously to the state courts* and to

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*Court Exhibit No.3. Disposition of the state court motion in the Supreme Court of Florida two days before the scheduled execution served to exhaust state remedies as to the claims of ineffective counsel.

this court with the aid of his present lawyers claiming, for the first time, that he received ineffective assistance of counsel not only at trial, but on the appeal as well. (See Magistrate's Report and Recommendation, p.47-48).

These remarks are not intended in any respect as a criticism of Petitioner's present counsel or as a disparagement of the seriousness of his claims. An appreciation of the history of the case is of vital significance, however, in underscoring the necessity of exercising great caution not to make the mistake of judging the performance of a lawyer through hindsight. Every lawyer makes mistakes; but more than that, every lawyer who ever lost a case has mused, often painfully, "What if . . .?"

Clearly, in this case, it might have been better in retrospect if counsel had

performed tactically in the manner now suggested. But when I look at the entire proceedings in the trial court - - rather than isolated portions of those proceedings - - and when I examine the challenged behavior and decisions of counsel in the context of the law and other controlling circumstances as they existed at that time, I am left with the abiding conviction that counsel rendered effective assistance. Not the best, by any means, but assistance which was surely sufficient to meet the test of constitutional minima.

The Clerk is directed to enter judgment dismissing the petition with prejudice. The Stay Order is DISSOLVED.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 7th day of November, 1980.

/S/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.— Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence,

and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. After hearing all the evidence,

the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. — Not withstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes

a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE. — The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES. —Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of

imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.

(c) The defendant knowingly created a great risk to death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping. or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

TITLE 28 U.S.C. §2245

CERTIFICATE OF TRIAL JUDGE
ADMISSIBLE IN EVIDENCE

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the

certificate of the judge who presided at the trial resulting in the judgment, setting forth facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

TITLE 28 U.S.C. §2246

EVIDENCE; DEPOSITIONS; AFFIDAVITS

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

TITLE 28 U.S.C. §2247

DOCUMENTARY EVIDENCE

On application for a writ of habeas

documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

RULES GOVERNING SECTION 2254 CASES IN UNITED STATES DISTRICT COURTS

Rule 7. Expansion of Record

(a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under

oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The court may require the authentication of any material under subdivision (b) or (c).

RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATE

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence

unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or . . .